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REPORTS OF CASES
DECIDED IN THE
APPELLATE COURTS
OF THE
STATE OF ILLINOIS

AT THE MARCH TERM OF THE FIRST DISTRICT, 1898; THE FEBRUARY
TERM OF THE FOURTH DISTRICT, 1898, AND THE MAY
TERM OF THE SECOND DISTRICT, 1898

VOL. LXXVII

REPORTED BY
MARTIN L. NEWELL
COUNSELOR AT LAW

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(1) THE SUPREME COURT.

The Supreme Court consists of seven justices, elected for a term of nine years, one from each of the seven districts into which the State is divided.

Formerly the State was divided into three grand divisions, Southern, Central and Northern, in which the terms were held, with one clerk for each of the three grand divisions elected for a term of six years, the court sitting at Mt. Vernon, Springfield and Ottawa.

In 1897 these divisions were consolidated into one comprising the entire State, and provision made that all terms of the court be held in the city of Springfield, on the first Tuesday in October, December, February, April and June of each year.

REPORTER.

ISAAC N. PHILLIPS.....Bloomington.

JUSTICES.

First District—CARROLL C. BOGGS.....Fairfield.
Second District—JESSE J. PHILLIPS.....Hillsboro.
Third District—JACOB W. WILKIN.....Danville.
Fourth District—JOSEPH N. CARTER.....Quincy.
Fifth District—ALFRED M. CRAIG.....Galesburg.
Sixth District—JAMES H. CARTWRIGHT.....Oregon.
Seventh District—BENJAMIN D. MAGRUDER.....Chicago.

The Chief Justice is chosen by the court, annually, at the June term. The rule of the court is to select as successor to the presiding justice the justice next in order of seniority who has not served as Chief Justice within six years last past. Mr. Justice Phillips is the present Chief Justice.

CLERKS.

CHRISTOPHER MAMER, Northern Grand Division, 158 Throop St., Chicago.
ALBERT D. CADWALLADER, Central Grand Division, Lincoln.
JACOB O. CHANCE, Southern Grand Division, Mt. Vernon.

The terms of office of these clerks expire 1902, after which time, under the act of 1897, but one clerk will be elected. The present clerks continue in charge of the records of their respective grand divisions as though said grand divisions had not been consolidated. All records, files, dockets and papers of their respective offices are now kept at the State House in Springfield.

(2) APPELLATE COURTS.

These Courts are held by Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One Clerk is elected in each district.

REPORTER.

MARTIN L. NEWELL, Springfield.

FIRST DISTRICT.

Composed of the county of Cook.
Court sits at Chicago on the first Tuesdays of March and October.
CLERK—Thomas N. Jamieson, Ashland Block, Chicago.

JUSTICES.

FRANCIS ADAMS, Ashland Block, Chicago.
NATHANIEL C. SEARS, Ashland Block, Chicago.
THOMAS G. WINDES, Ashland Block, Chicago.

BRANCH APPELLATE COURT.*

FIRST DISTRICT.

JUSTICES.

HENRY M. SHEPARD, Ashland Block, Chicago.
HENRY V. FREEMAN, Ashland Block, Chicago.
OLIVER H. HORTON, Ashland Block, Chicago.

APPELLATE COURT,

SECOND DISTRICT.

Composed of the Northern Grand Division of the Supreme Court, except Cook county.
Court sits at Ottawa, La Salle county, on the third Tuesday in May, and the first Tuesday in December.
CLERK—Columbus C. Duffy, Ottawa.

JUSTICES.

JOHN D. CRABTREE, Dixon.
DORRANCE DIBELL, Joliet.
HARRY HIGBEE, Pittsfield.

THIRD DISTRICT.

Composed of the Central Grand Division of the Supreme Court.
Court sits at Springfield, Sangamon county, on the third Tuesdays in May and November.
CLERK—W. C. Hippard, Springfield.

JUSTICES.

OLIVER A. HARKER, Carbondale.
BENJAMIN R. BURROUGHS, Edwardsville.
JOHN J. GLENN, Monmouth.†
FRANCIS M. WRIGHT, Urbana.

* This court is a branch of the Appellate Court of the first district, and is held by three judges of the Circuit Court, designated and assigned by the Supreme Court under the provisions of the act of the General Assembly, approved June 2, 1897. Hurd's Statute, 1897, 508. Laws of 1897, 183.

† Resigned, October 7th, 1898.

FOURTH DISTRICT.

Composed of the Southern Grand Division of the Supreme Court.
Court sits at Mount Vernon, Jefferson county, on the fourth Tues-
days in February and August.

CLERK—Frank W. Havill, Mount Vernon.

JUSTICES.

JAMES A. CREIGHTON, Springfield.
NICHOLAS E. WORTHINGTON, Peoria.
HIRAM BIGELOW, Galva.

(3) CIRCUIT COURTS.

Exclusive of Cook county, the State of Illinois is divided into Seven-
teen Judicial Circuits, as follows:

First Circuit.—The counties of Alexander, Pulaski, Massac, Pope,
Johnson, Union, Jackson, Williamson and Saline.

JUDGES.

JOSEPH P. ROBERTS, Cairo.
OLIVER A. HARKER, Carbondale.
ALONZO K. VICKERS, Vienna.

Second Circuit.—The counties of Hardin, Gallatin, White, Hamilton,
Franklin, Wabash, Edwards, Wayne, Jefferson, Richland, Lawrence and
Crawford.

JUDGES.

EDMUND D. YOUNGBLOOD, Mount Vernon.
PRINCE A. PEARCE, Carui.
ENOCH E. NEWLIN, Robinson.

Third Circuit.—The counties of Randolph, Monroe, St. Clair, Madison,
Bond, Washington and Perry.

JUDGES.

BENJAMIN R. BURROUGHS, Edwardsville,
MARTIN W. SCHAEFFER, Belleville.
WILLIAM HARTZELL, Chester.

Fourth Circuit.—The counties of Clinton, Marion, Clay, Fayette, Ef-
ingham, Jasper, Montgomery, Shelby and Christian.

JUDGES.

WILLIAM M. FARMER, Vandalia.
TRUMAN E. AMES, Shelbyville.
SAMUEL L. DWIGHT, Centralia.

Fifth Circuit.—The counties of Vermillion, Edgar, Clark, Cumber-
land and Coles.

JUDGES.

HENRY VAN SELLAR, Paris.
FERDINAND BOOKWALTER, Danville.
FRANK K. DUNN, Charleston.

Sixth Circuit.—The counties of Champaign, Douglas, Moultrie, Ma-
con, DeWitt and Platt.

JUDGES.

FRANCIS M. WRIGHT, Urbana.
EDWARD P. VAIL, Decatur.
WILLIAM G. COCHRAN, Sullivan.

Seventh Circuit.—The counties of Sangamon, Macoupin, Morgan, Scott, Green and Jersey.

JUDGES.

JAMES A. CREIGHTON, Springfield.
ROBERT B. SHIRLEY, Carlinville.
OWEN P. THOMPSON, Jacksonville.

Eighth Circuit.—The counties of Adams, Schuyler, Mason, Cass, Brown, Pike, Calhoun and Menard.

JUDGES.

JOHN C. BROADY, Quincy.
HARRY HIGBEE, Pittsfield.
THOMAS N. MEHAN, Mason City.

Ninth Circuit.—The counties of Knox, Warren, Henderson, Hancock, McDonough and Fulton.

JUDGES.

JOHN J. GLENN, Monmouth.
GEORGE W. THOMPSON, Galesburg.
JOHN A. GRAY, Canton.

Tenth Circuit.—The counties of Peoria, Marshall, Putnam, Stark and Tazewell.

JUDGES.

LESLIE D. PUTERBAUGH, Peoria.
THOMAS M. SHAW, Lacon.
NICHOLAS E. WORTHINGTON, Peoria.

Eleventh Circuit.—The counties of McLean, Livingston, Logan, Ford and Woodford.

JUDGES.

COLOSTIN D. MYERS, Bloomington.
GEORGE W. PATTON, Pontiac.
JOHN H. MOFFETT, Paxton.

Twelfth Circuit.—The counties of Will, Kankakee and Iroquois.

JUDGES.

DORRANCE DIBELL, Joliet.
ROBERT W. HILSCHER, Watseka.
JOHN SMALL, Kankakee.

Thirteenth Circuit.—The counties of Bureau, LaSalle and Grundy.

JUDGES.

CHARLES BLANCHARD, Ottawa.
HARVEY M. TRIMBLE, Princeton.
SAMUEL C. STOUGH, Morris.

Fourteenth Circuit.—The counties of Rock Island, Mercer, Whiteside and Henry.

JUDGES.

HIRAM BIGELOW, Galva.
WILLIAM H. GEST, Rock Island.
FRANK D. RAMSAY, Morrison.

Fifteenth Circuit.—The counties of Jo Daviess, Stephenson, Carroll, Ogle and Lee.

JUDGES.

JOHN D. CRABTREE, Dixon.
JAMES SHAW, Mount Carroll.
JAMES S. BAUME, Galena.

Sixteenth Circuit.—The counties of Kane, Du Page, De Kalb and Kendall.

JUDGES.

HENRY B. WILLIS, Elgin.
CHARLES A. BISHOP, Sycamore.
GEORGE W. BROWN, Wheaton.

Seventeenth Circuit.—The counties of Winnebago, Boone, McHenry and Lake.

JUDGES.

JOHN C. GARVER, Rockford.
CHARLES E. FULLER, Belvidere.
CHARLES H. DONNELLY, Woodstock.

(4) COURTS OF COOK COUNTY.

The State Constitution recognizes Cook county as one judicial circuit, and establishes the Circuit and Superior Courts of said county. The Criminal Court of Cook County is also established with jurisdiction of a Circuit Court in criminal cases only. The judges of the Circuit and Superior Courts are judges, *ex-officio*, of the Criminal Court.

CIRCUIT COURT.

CLERK—John A. Cooke, County Building, Chicago.

JUDGES.

EDWARD F. DUNNE,
MURRAY F. TULEY,
RICHARD S. TUTHILL,
FRANCIS ADAMS,
ARBA N. WATERMAN,
ELBRIDGE HANEY,
OLIVER H. HORTON,

JOHN GIBBONS,
RICHARD W. CLIFFORD,
THOMAS G. WINDES,
EDMUND W. BURKE,
CHARLES G. NEELY,
FRANK BAKER,
ABNER SMITH.

SUPERIOR COURT.

CLERK—John A. Linn, County Building, Chicago.

JUDGES.

HENRY M. SHEPARD,
THEODORE BRENTANO,
PHILIP STEIN,
WILLIAM G. EWING,
JONAS HUTCHINSON,
GEORGE A. TRUDE.*

ARTHUR H. CHETLAIN,
HENRY V. FREEMAN,
JOHN BARTON PAYNE,
NATHANIEL C. SEARS,
FARLIN Q. BALL,
JOSEPH E. GARY.

*Appointed to fill vacancy May 3, 1896.

(5) COUNTY AND PROBATE COURTS.

In the counties of Cook, La Salle and Peoria, each having a population of over 50,000, probate courts are established, distinct from the county courts. In the other counties the county courts have jurisdiction in all matters of probate.

JUDGES.	COUNTIES.	COUNTY SEATS.
CARL E. EPLER.....	Adams.....	Quincy.
WM. S. DEWEY.....	Alexander.....	Cairo.
JOSEPH STORY.....	Bond.....	Greenville.
WALEW W. WOOD.....	Boone.....	Belvidere.
R. E. VANDEVENTER.....	Brown.....	Mt. Sterling.
RICHARD M. SKINNER.....	Bureau.....	Princeton.
ANDREW J. EMERICK.....	Calhoun.....	Hardin.
ALVA F. WINGERT.....	Carroll.....	Mt. Carroll.
HENRY PHILLIPS.....	Cass.....	Virginia.
CALVIN C. STALEY.....	Champaign.....	Urbana.
LYMAN G. GRUNDY.....	Christian.....	Taylorville.
WM. T. HOLLENBECK.....	Clark.....	Marshall.
BEN HAGLE.....	Clay.....	Louisville.
JOSEPH HANKE.....	Clinton.....	Carlyle.
S. S. ANDERSON.....	Coles.....	Charleston.
ORRIN N. CARTER (C).....	Cook.....	Chicago.
C. C. KOHLSAAT (P).....	Cook.....	Chicago.
JOHN C. EAGLETON.....	Crawford.....	Robinson.
GESHAM MONOHON.....	Cumberland.....	Toledo.
WILLIAM L. POND.....	DeKalb.....	Sycamore.
GEO. K. INGHAM.....	DeWitt.....	Clinton.
WM. H. BASSETT.....	Douglas.....	Tuscola.
JOHN H. BATTEN.....	DuPage.....	Wheaton.
ERASMUS G. ROSE.....	Edgar.....	Paris.
WM. MCGREGOR.....	Edwards.....	Albion.
WM. B. WRIGHT.....	Effingham.....	Effingham.
GEO. T. TURNER.....	Fayette.....	Vandalia.
ALEXANDER MCELROY.....	Ford.....	Paxton.
W. F. DILLON.....	Franklin.....	Benton.
GILBERT L. MILLER.....	Fulton.....	Lewistown.
D. M. KINSALL.....	Gallatin.....	Shawneetown.
JOHN C. BOWMAN.....	Greene.....	Carrollton.
A. R. JORDON.....	Grundy.....	Morris.
SAML. M. WRIGHT.....	Hamilton.....	McLeansboro.
DAVID E. MACK.....	Hancock.....	Carthage.
WM. J. HALL.....	Hardin.....	Elizabethtown.
RANSELDON COOPER.....	Henderson.....	Oquawka.
A. R. MOCK.....	Henry.....	Cambridge.
C. W. RAYMOND.....	Iroquois.....	Wateeka.
ROBT. MCELVAIN.....	Jackson.....	Murphysboro.
H. M. KASSERMAN.....	Jasper.....	Newton.
ROBT. M. FARTHING.....	Jefferson.....	Mt. Vernon.
ALLEN M. SLATTEN.....	Jersey.....	Jerseyville.
WM. T. HODSON.....	Jo Davies.....	Galena.
O. R. MORGAN.....	Johnson.....	Vienna.
M. O. SOUTHWORTH.....	Kane.....	Geneva.
EREN B. GOWEE.....	Kankakee.....	Kankakee.
HENRY S. HUDSON.....	Kendall.....	Yorkville.
PATRICK H. SANFORD.....	Knox.....	Galesburg.
DEWITT L. JONES.....	Lake.....	Waukegan.

JUDGES.	COUNTIES.	COUNTY SEATS.
HENRY W. JOHNSON (C).....	LaSalle	Ottawa.
ALBERT T. LARDIN (P).....	LaSalle	Ottawa.
AMOS N. GOODMAN.....	Lawrence	Lawrenceville.
RICHARD S. FARRAND.....	Lee	Dixon.
CHAS. M. BARICKMAN.....	Livingston	Pontiac.
L. C. SCHWERDTFEGER.....	Logan	Lincoln.
WM. L. HAMMER.....	Macon	Decatur.
H. H. COWEN.....	Macoupin	Carlinville.
WM. P. EARLY.....	Madison	Edwardsville.
CHAS. F. PATTERSON.....	Marion	Salem.
E. D. RICHMOND.....	Marshall	Lacon.
JAMES A. MCCOMAS.....	Mason	Havana.
GEORGE SAWYER.....	Massac	Metropolis.
W. W. MELOAN.....	McDonough	Macomb.
ORSON H. GILLMORE.....	McHenry	Woodstock.
ROLAND A. RUSSELL.....	McLean	Bloomington.
HENRY H. HOAGLAND.....	Menard	Petersburg.
JAMES H. CONNELL.....	Mercer	Aledo.
PAUL C. BREY.....	Monroe	Waterloo.
GEO. R. COOPER.....	Montgomery	Hillsboro.
CHARLES A. BARNES.....	Morgan	Jacksonville.
ISAAC HUDSON.....	Moultrie	Sullivan.
JOHN D. CAMPBELL.....	Ogle	Oregon.
ROBERT H. LOVETT (C).....	Peoria	Peoria.
JOSEPH W. MAPLE (P).....	Peoria	Peoria.
R. W. S. WHEATLEY.....	Perry	Pinckneyville.
F. M. SHONKWILER.....	Piatt	Monticello.
WM. B. GRIMES.....	Pike	Pittsfield.
DAVID G. THOMPSON.....	Pope	Golconda.
JOHN D. BRISTOW.....	Pulaski	Mound City.
JOHN M. McNABB.....	Putnam	Hennepin.
SAMUEL L. TAYLOR.....	Randolph	Chester.
T. W. HUTCHISON.....	Richland	Olney.
LUCIAN ADAMS.....	Rock Island.....	Rock Island.
ALBERT W. LEWIS.....	Saline	Harrisburg.
CHARLES P. KANE.....	Sangamon	Springfield.
D. L. MOURNING.....	Schuyler	Rushville.
JAMES CALLANS.....	Scott	Winchester.
WM. H. RAGAN.....	Shelby	Shelbyville.
WM. W. WRIGHT.....	Stark	Toulon.
EDWARD C. ROADS.....	St. Clair	Belleville.
JAMES H. STEARNS.....	Stephenson.....	Freeport.
W. R. CURRAN.....	Tazewell	Pekin.
MONROE C. CRAWFORD.....	Union	Jonesboro.
M. W. THOMPSON.....	Vermilion	Danville.
ROBERT BELL.....	Wabash	Mt. Carmel.
T. G. PEACOCK.....	Warren	Monmouth.
GEO. VERNOR.....	Washington.....	Nashville.
WM. T. BONHAM.....	Wayne	Fairfield.
JAMES C. PEARCE.....	White	Carmi.
HENRY C. WARD.....	Whiteside.....	Morrison.
ALBERT O. MARSHALL.....	Will	Joliet.
W. F. SLATTER.....	Williamson	Marion.
RUFUS C. BAILEY.....	Winnebago.....	Rockford.
A. M. CAVAN.....	Woodford.....	Eureka.

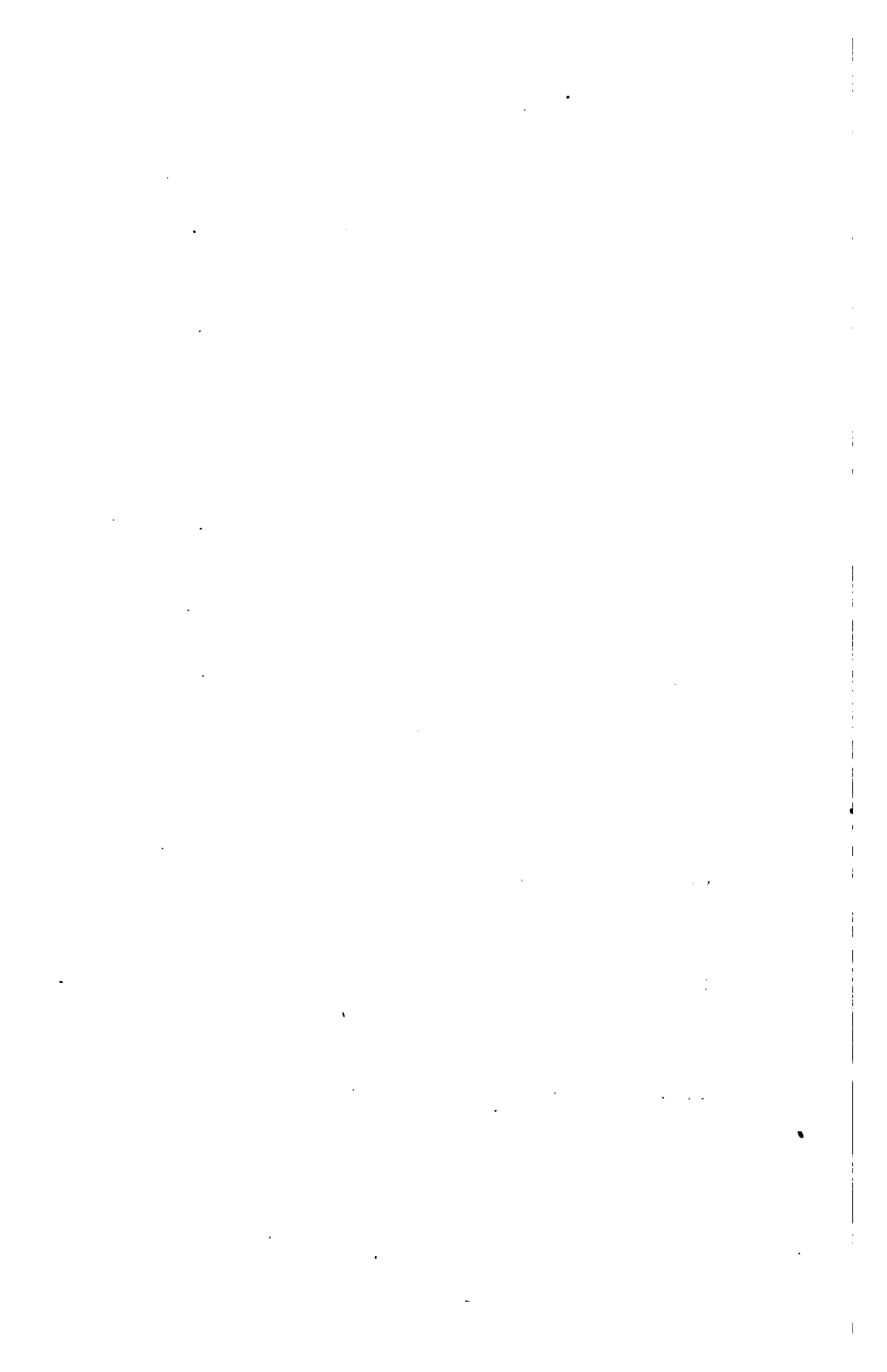


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CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

FIRST DISTRICT—MARCH TERM, 1898.

Green & Lombard Lumber Co. v. Lewis R. Bain, Jacob Lilley, The Northern Trust Co., and Unknown Owners.

1. **MECHANICS' LIENS—Sub-Contractors—Notice.**—A sub-contractor or party furnishing materials, in order to preserve his lien, must give a notice to the owner showing the amount due or to become due and when it became due or will become due.

2. **SAME—Suit to Enforce Liens—When to be Commenced.**—A suit to enforce a sub-contractor's lien must be commenced within four months after the time that the final payment is shown to be due to the sub-contractor or party furnishing materials.

Petition to Enforce a Mechanic's Lien.—Trial in the Superior Court of Cook County; the Hon. HENRY V. FREEMAN, Judge, presiding. Hearing and petition dismissed. Appeal by petitioner. Heard in this court at the March term, 1898. Affirmed. Opinion filed July 21, 1898.

LEVI SPRAGUE, attorney for appellant.

HOWARD COLLVER, attorney for appellees.

MR. JUSTICE SEARS delivered the opinion of the court.

Appellant filed its petition to enforce a mechanic's lien against appellees. Appellee Bain, who is owner of the property upon which lien is sought, filed a demurrer to the petition. The demurrer was sustained and the petition dismissed. The only question as to the propriety of the decree

dismissing the petition arises by reason of the form of the notice given to appellee Bain by appellant. The lien accrued under the statute of 1895. The notice served is as follows:

NOTICE OF LIEN.

To L. R. BAIN: You are hereby notified that the Green & Lombard Lumber Co., a corporation, etc., under the laws of the State of Illinois, having its principal office in Chicago, has been employed by Jacob Lilley, a contractor, to furnish lumber, material, etc., upon your building at Flournoy and Kedzie Ave., in Chicago, in the county of Cook and State of Illinois, and that it will hold the building and your interest in the grounds liable for the amount of \$489.22 dollars, due it on account thereof.

Dated this 4th day of February, A. D. 1897.

GREEN & LOMBARD LUMBER CO.

By George Green, President."

The petition to enforce the lien was filed on June 15, 1897.

Appellant was a sub-contractor, or party furnishing materials. The statute requires that to preserve his lien against the owner, a sub-contractor, or party furnishing materials, must give a notice to the owner which, among other things, must show the amount due or to become due, and when it became or will become due.

If this notice can be held to comply with the requirement of the statute, it must be by construing it to state the amount therein named to be due at the date of the notice, viz., February 4, 1897.

But the statute also provides that suit to enforce such lien must be begun within four months after the time that the final payment is shown to be due to the sub-contractor or party furnishing materials. This suit was begun on June 15, 1897, after the expiration of the four months. Such statutory provisions are enforced by the courts. *Huntington v. Barton*, 64 Ill. 502; *Rittenhouse v. Sable*, 43 Ill. App. 558.

The demurrer was properly sustained.

The decree is affirmed.

Henry M. Mason v. Chicago Title & Trust Co.

77	19
80	400
83	590

1. **DEPOSITIONS—Suppression of.**—*When Witness is Not a Non-Resident.*—The deposition of a witness taken in another State under the terms of a stipulation of the parties will not be suppressed, on the ground that the witness did not at the time reside in such State, but was in fact a resident of the county in which the suit was pending.

2. **ASSIGNMENTS—Oral, of Accounts.**—An oral assignment of accounts receivable, made by a corporation prior to a general assignment for the benefit of creditors, is sufficient to pass the equitable title to such accounts.

Voluntary Assignments.—Petition to have certain accounts receivable turned over to the assignee. Trial in the County Court of Cook County; the Hon. J. H. BATTEN, Judge, presiding. Hearing and decree entered dismissing the petition. Appeal by petitioner. Heard in this court at the March term, 1898. Reversed and remanded. Opinion filed July 21, 1898.

FRANK O. LOWDEN and EDWARD B. BURLING, attorneys for appellant.

KNIGHT & WAGNER, attorneys for appellee.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

This is an appeal from a decree of the County Court of Cook County, dismissing a petition filed by the appellant, Henry M. Mason, against the Chicago Title & Trust Company, assignee of Straw & McCoy Company, a corporation, insolvent. The petition prayed that the court should order the assignee to turn over to the petitioner certain statements of accounts receivable of the insolvent, which the petitioner alleged had been assigned to him by the insolvent corporation prior to its general assignment to the Chicago Title & Trust Company. The court found, as a fact, that no accounts had been assigned to Mason by the insolvent, and that the insolvent had made no agreement to assign any accounts to him, and accordingly the petition was dismissed.

From the order dismissing his petition Mason has appealed, and assigns numerous errors, but only argues that the evidence does not sustain the finding of the County Court; that the oral assignment of the accounts to Mason was good in law; and that the court erred in overruling the motion of appellant to suppress the deposition of Mrs. McCoy. We will consider these points in the inverse order of the argument. The deposition of Mrs. McCoy was taken pursuant to commission issued out of the County Court of Cook County, which stated that said witness resided at Waukesha, Wisconsin, upon notice to petitioner and upon oral interrogatories, and also pursuant to a stipulation of petitioner's attorneys waiving the statutory time of notice, and that the deposition might be taken on Saturday, October 23, 1897, at the office of V. H. Tichnor, at the Coleman House in Waukesha, Wisconsin.

It developed on the cross-examination of the witness that she resided in Chicago, and not at Waukesha, Wisconsin, but that she went to Waukesha, Wisconsin, on the day her deposition was taken, to attend upon her mother, who was then sick at Waukesha. When the deposition was offered in evidence, petitioner moved the court to suppress the same, because of the said matters developed on the cross-examination, and because no reason appeared of record why Mrs. McCoy was not produced in court to testify. No showing was made to the trial judge, but that petitioner and his attorneys knew, when they stipulated that the deposition might be taken, that Mrs. McCoy resided in Chicago. Therefore, in view of the stipulation, the court was justified in overruling the motion to quash.

The assignment of the accounts receivable, claimed to have been made to petitioner prior to the general assignment for benefit of creditors made to appellee, was oral, but if established by the proof, was sufficient to pass the equitable title of the accounts in question to petitioner. It is not necessary that such assignment should be in writing. 2 Story's Eq. Juris. p. 266, Sec. 1047 (12th Ed.); York v. Conde, 61 Hun (N. Y.), 26 and cases cited; Pass v. McRae,

36 Miss. 149; Savage v. Gregg, 150 Ill. 161; Chapman v. Plummer, 36 Wis. 265.

In Story's Eq. Juris., *supra*, the author states: "Any order, writing or act, which makes an appropriation of a fund, amounts to an equitable assignment of the fund."

In the York case, *supra*, in which there was a contest between a written assignment of a chose in action and a previous oral one, the court said: "The first assignment was not invalid because it was oral," and reversed the judgment of the trial court in holding that the written assignment should prevail.

In the Pass case, *supra*, in which the question was as to the effect of an oral assignment, the court said: "We think it is well settled both upon principle and authority that the rights of equitable assignees will be protected by the courts of law as well as by courts of equity, and whenever it sufficiently appears that it is the intention and understanding of the parties that the transaction shall be an assignment, there is nothing in the law to prevent its having that effect. It is manifest from the proof in this case that the Planters Bank was intended and understood to be the beneficial owner of said account prior to the rendition of judgment thereon, and of said judgment after its rendition."

In the Chapman case, *supra*, in which the question was as to an oral assignment of an account for rent, the court said:

"We are not aware that any particular formality is necessary to effect a transfer of such a claim. Any transaction between the contracting parties which indicates their intention to pass the beneficial interest in the instrument from one to the other is sufficient for that purpose; a debt may be assigned in equity by parol as well as by writing."

The evidence on behalf of the petitioner as to the assignment in question consisted of the testimony of five witnesses, including two attorneys who acted on behalf of, and advised the officers of the insolvent corporation in reference to the assignment; were familiar with and took part in its details, and appear to be fair, honest and disinterested witnesses. One of the witnesses was the bookkeeper of the

insolvent, whose affidavit was read on behalf of appellee. As opposed to those on behalf of appellee, there was read the deposition and affidavit of Mrs. McCoy, the treasurer of the insolvent, the affidavits of her husband, William A. McCoy, its general manager, and William F. Servis, its bookkeeper.

We have fully and carefully considered all the evidence bearing on the question of the assignment, and are of opinion that its clear weight is against the finding of the County Court, and that it establishes, as against the testimony on behalf of appellee in this record, that there was a valid oral assignment by the insolvent corporation, based on a good consideration, of the accounts in question to Mason prior to the assignment for the benefit of creditors to appellee.

Inasmuch, however, as there appears from the record to be two persons, Mr. and Mrs. Straw, the president and secretary of the insolvent, who were not called, though present when it is claimed the assignment was made, and because on another hearing the testimony of Mr. and Mrs. McCoy may be heard in open court and Mrs. McCoy subjected to cross-examination, the judgment of the County Court will be reversed and the cause remanded.

77	22
890	142

Peter J. O'Conner, by His Next Friend, etc., v. Illinois Central Railroad Co.

1. **TRESPASSER**—*On Railroad Grounds, May Recover, When.*—A trespasser, although negligent in going on defendant's tracks, may still recover, if the acts of defendant's servants, under all the circumstances shown, may be said to have been willful or wanton.

2. **PERSONAL INJURIES**—*Evidence of Use of Tracks by Pedestrians—When Competent.*—In an action by a boy for personal injuries received while trespassing upon the tracks of a railroad company, it is competent to show that great crowds of people, with the company's knowledge, were accustomed to cross the tracks each day, at about the time of the accident; and is proper to be considered by the jury in determining, as a matter of fact, whether the acts of the company's servants, in running its trains without a light along the tracks at such a place, known to them

O'Conner v. I. C. R. R. Co.

to be constantly used by crowds of people at the particular time of the evening when the injuries were received, were not so reckless and grossly negligent as to be denominated willful and wanton.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Verdict for defendant by direction of the court. Error by plaintiff. Heard in this court at the March term, 1898. Reversed and remanded. Opinion filed July 31, 1898.

STATEMENT OF FACTS.

This writ of error is to reverse a judgment of the Circuit Court of Cook County entered upon a verdict, directed by the trial judge at the conclusion of all the evidence, in an action on the case to recover for personal injuries.

The plaintiff, a boy thirteen years and eleven months of age, while attempting to cross the defendant's tracks—with which he was entirely familiar and knew that trains were passing thereon day and night frequently, and might be expected at any time at 25th street—on the night of June 1, 1895, was run over by a train and his right arm so injured that it became necessary to amputate it at the shoulder.

The defendant's tracks, eight or nine in number, extended along the lake shore from Lake to 51st street, a distance of about five miles. The city of Chicago is immediately west of the tracks. There was a stone wall part of the distance along the west line of the defendant's right of way, and no public crossings over the tracks between Lake and 51st streets. There was a private crossing for dump carts and wagons at 27th street. There were also viaducts about four feet wide which crossed the tracks, one at 22d street and one at 29th street, but they were private ways and so marked. With these viaducts and crossing and their use plaintiff was familiar.

Twenty-fifth street was a street running east and west in the city of Chicago, and ended at this wall along defendant's right of way. For about two years prior to the accident there were wooden steps leading from 25th street to the top of the wall, which was about three or four feet above the street, and next to the tracks about six feet, and there were

coupling pins driven in the masonry by which a person could descend from the top of the wall to the tracks. Commencing immediately north of 25th street, and extending all along to the north, and commencing south of 25th street below defendant's shops, and extending southward, there was an iron picket fence on top of this wall. There was nothing on top of the wall at 25th street. On the night of the accident the plaintiff and seven boys, nearly all of whom were older than the plaintiff, left their homes, in the vicinity of Canal and 25th streets, to go to the lake. They descended on the coupling pins to the ground, crossed the tracks to the lake and went in swimming. They were recrossing the tracks on their return at about half-past eight when the accident happened. There was a line of cars standing on one of the east tracks, which extended both north and south of 25th street, with an opening between the cars at 25th street. The point where the boys went in swimming was a little south of 25th street. From this point they walked north along the cars to 25th street and started to recross the tracks on a line with 25th street to the coupling pins and steps, by means of which they were to recross the wall. The plaintiff was a few feet ahead of the other boys. After passing the cars he and some of the other boys testified that they looked both north and south and saw no train approaching. It is a fair inference from the evidence that if plaintiff had looked he could have seen the approaching car. The plaintiff had crossed to about the first or second track from the standing cars when he was run over by a train being pushed north, and sustained the injuries complained of.

The evidence showed the train to have been about seven to ten cars in length, with the engine upon the south end. The first three cars to the north were coal cars. There were then some box cars and other coal cars closer to the engine.

The plaintiff and one of his witnesses testified that they did not see any light on the forward or north end of this train, and they received no warning of any kind of its approach. Two of plaintiff's witnesses testified there was

no light on the forward end of the train, but one of them, on cross-examination, said he could not tell whether there was a light or not. Two witnesses, switchmen on the train of the defendant, testified positively that there was a conspicuous red light on the north end of the car which struck plaintiff, and that it was burning before the accident and immediately after. The trainmen said the train was running about six or seven miles an hour.

A city ordinance was introduced in evidence which required such train to have a brilliant and conspicuous light on the forward end when being backed along the track.

Plaintiff offered to show that great crowds of people were in the habit of crossing and recrossing these tracks at this place between 7 and 9 o'clock of summer evenings for years prior to the accident; and offered to show by a trainman on the train in question that he knew of such use. He also offered to show that there were great crowds of people passing up and down the lake shore immediately east of the tracks. The court ruled this testimony out, to which ruling the plaintiff excepted. There was no fence or obstruction of any kind between the tracks and the lake shore. It did appear in evidence, however, that there were perhaps two hundred persons in swimming at the place where the plaintiff was swimming on the night of the accident.

JAMES C. MoSHANE, attorney for plaintiff in error.

JOHN G. DRENNAN, attorney for defendant in error; C. V. GWIN, of counsel.

MR. PRESIDING JUSTICE WINDES, after making the foregoing statement, delivered the opinion of the court.

The plaintiff's counsel claims that the defendant is liable because its servants knew or were chargeable with a knowledge that great numbers of people were in the habit of crossing defendant's tracks at the place where the accident occurred at all times of day and night, and particularly between 7 and 9 p. m., between which hours plaintiff was

injured; that defendant did not object to such use, but acquiesced in it, and that to back its train across this passageway in the night time, at the rate of six miles per hour, without a light on the rear end thereof, in violation of the city ordinance (as the evidence tended to prove), in view of these facts, showed such a gross want of care and regard for the rights of others as to justify the presumption of willfulness and wantonness. He also claims that defendant was negligent in not maintaining a proper barrier or obstruction on the stone wall separating its tracks from 25th street; that plaintiff, by reason of his youth, was attracted to the lake for the purpose of bathing, crossed defendant's tracks to the lake, and when returning across the tracks, in the exercise of ordinary care and caution for one of his years, was injured by the carelessness and negligence of defendant's servants, for which defendant is liable.

The latter contention we think is not tenable, nor do we understand that plaintiff's counsel seriously contends for this position. We therefore dismiss it without discussion, and proceed to the consideration of what, to us, seems the vital question of the case. Under the facts in this record, and in addition assuming that plaintiff could prove what he offered to show, there can be no recovery unless it may be said these facts show "such a gross want of care and regard for the rights of others as to justify the presumption of willfulness or wantonness" on the part of defendant's servants.

If plaintiff was a trespasser (and we think that is established by the evidence) and was negligent in going on defendant's tracks, still he may recover if the acts of defendant's servants, under all the circumstances shown, may be said to have been willful or wanton. The ordinance of the city of Chicago introduced and read in evidence required that every railroad car or train of cars running in the night time on any railroad track in the city, should have and keep while so running a brilliant and conspicuous light on the forward end of the car or train of cars, and if the train be backing, as was the case in this instance, it should have a conspicuous light on the rear car, so as to show the direction said car was moving.

As to whether there was such a light on the rear car of the train in question there was a conflict in the evidence, the plaintiff and one of his witnesses testifying to a state of circumstances tending strongly to show that had there been such a light they could have seen it, but they said they did not see a light. Two other witnesses for plaintiff testified that there was no light, but one of them admitted, on cross-examination, that he did not know whether there was a light or not. Two witnesses for the defendant, switchmen of the train (one of whom was charged with the duty of placing a light on the rear car), testified that there was a conspicuous red light on the end of the rear car; that they examined it immediately after the accident, and that it was then burning.

If there was no light on the rear of this car as it was backed to the north, then we think it became material to consider, in that connection, the evidence which was offered by plaintiff and excluded by the court, to the effect "that the defendant's tracks opposite 25th street were constantly used by great crowds of people, especially between the hours of seven and nine o'clock in the evening, in going back and forth between 25th street and the lake, and also that there were thousands of people between those hours constantly passing up and down the lake shore immediately east of defendant's tracks at this point," and that defendant's servants knew these facts, in order to determine, as a matter of fact, whether the acts of defendant's servants in so running its train without a light along the tracks, across a place known to them to be constantly used by great crowds of people at that particular time of the evening, were not so reckless and grossly negligent as to be denominated willful and wanton. It will be conceded that had defendant's servants seen the boy in time to have avoided injuring him by the exercise of ordinary care on their part, the defendant would be liable although the boy was a trespasser, because the servant's acts would then be held to be willful and wanton. We think this state of fact can not, as matter of law, be different, so far as concerns defendant's liability to

plaintiff, than it would be were the jury to believe from the evidence produced and offered that the acts of defendant's servants, under the circumstances shown, amounted to willfulness and wantonness on their part. The question, in our opinion, was one of fact for the determination of the jury, and the court erred in excluding the proffered evidence by the plaintiff, and with such evidence before the jury, it would be the duty of the trial court to submit the case to their verdict in the first instance.

It is unnecessary to review the numerous cases cited by counsel on both sides, and is sufficient to refer to only three.

In the case of *Ry. Co. v. Bodemer*, 139 Ill. 596, a boy nine years of age was killed while crossing the railway tracks at a place not a street crossing, but between two streets that were much frequented by men and teams, and where there was a roadway on each side of the tracks which were claimed to be on the private right of way of the railway company, just after the last car of a long and noisy freight train had passed, by the engine of a passenger train going in the opposite direction at great speed. It was contended that, as deceased was a trespasser upon the railroad's right of way, there was no liability. The court said: "It has been held that when a trespasser upon the tracks of a railroad company is injured, the company is not liable, unless the injury was wantonly or willfully inflicted, or was the result of such gross negligence as evidences willfulness." After reciting the facts in detail, from which it fails to appear that defendant's servants saw the boy in time to avoid the accident, the court further said: "We are unable to say that there was not evidence enough to justify the court in leaving it to the jury to say whether or not the boy was killed by the wanton and willful negligence of the company. * * * The jury were authorized to look at the conduct of the engineer in the light of all the facts in the case. It has been said: 'What degree of negligence the law considers equivalent to a willful or wanton act is as hard to define as negligence itself, and in the nature of things, is so dependent upon the particular circumstances of

O'Conner v. I. C. R. R. Co.

each case as not to be susceptible of general statement.” And after quotations from numerous authorities, in speaking of the negligence, the court further said: “Let these principles be applied to the case at bar. The train which committed the injury was traveling at the unusual speed of thirty-five or forty miles an hour, in the crowded city of Chicago, over street crossings; upon unguarded tracks so connected with a public street and so apparently the continuation of a public street as to be regarded by ordinary citizens as located in a public street; along a portion of such tracks where persons were known to be passing and crossing every day; in conceded violation of a city ordinance as to speed; and without warning of the approach of the train by the ringing of a bell. This conduct tended to show such a gross want of care and regard for the rights of others as to justify the presumption of willfulness. It also tended to show that if there was failure to discover the danger of deceased, such failure was owing to the recklessness of the company’s servants in the management of its train.” The court also held that the trial court did not err in admitting evidence of the passing of persons across the track, because at the time the evidence was admitted the proof tended to show that the tracks were in a public street, or what was called and regarded as a public street, and after the defendant introduced its proof tending to show the ownership of the strip of land on which the tracks were located, it did not move to exclude the evidence as to the passing of persons over the tracks, declined to further consider the question as to whether the company was relieved from liability for injury to such persons, and affirmed a judgment against the defendant.

In *Ry. Co. v. O’Hara*, 150 Ill. 580, in which there was a conflict in the evidence as to whether the tracks of the railway were in a public street or on its private right of way, evidence was admitted tending to show that the public had been in the habit for many years of crossing over the track at the place of the injury. The second count of the declaration charged that the negligence of the railway company

was wanton and willful. The report of the case does not show that there was any objection to evidence, nor that the railway company's servants knew of the plaintiff's presence on the railway tracks. In speaking of the acts of negligence in the second count, and the claim of counsel that there was no evidence tending to prove wanton or willful misconduct, the court said: "If it be true, as the evidence tends to show, that the defendant's servants, at the time the plaintiff was injured, were running their engine in the dark, without a headlight, or a bell ringing, and at a high and dangerous rate of speed, along a much frequented street, and when many persons were likely to be passing on their way to the ferry landing or otherwise, such acts would be liable to the construction of being in wanton and willful disregard of the rights and safety of the public generally, so as to amount in law to wanton and willful negligence. And it was not necessary, in order to raise an inference of such negligence, to prove that the defendant's servants were actuated by ill-will directed specifically toward the plaintiff, or to have known that he was in such position as to be likely to be injured." The judgment in favor of the plaintiff was affirmed.

In *C. & A. R. R. Co. v. O'Neill*, 172 Ill. 527, the injury occurred upon an open space between two streets, where several railroad tracks were laid and in use, in the immediate vicinity of which were several packing houses where large numbers of persons were daily employed. The tracks in question were not clearly shown to be owned by the Stock Yards Company of Chicago but it charged divers railroad companies, including appellant, for the use of the tracks a certain amount. Some freight cars were being switched along the tracks over and along which Mrs. O'Neill, going from her work, was walking, by appellant's engine, and one of the cars, with an open door projecting about nine inches, and without a light on it, was "kicked" down the tracks in the direction in which she was going, and apparently was not observed by her until it was within a few feet of her, when she stepped off the track next to a

platform, and by reason of the projecting door was struck and killed. It was quite dark, and there was no brakeman on the car. The same ordinance was offered in evidence and relied on by plaintiff as in the case at bar, though it fails to appear whether it was pleaded or not. Some of the counts of the declaration alleged that the place of the accident was a public place, others that it was a public place open to the public, and they all alleged that the acts of the defendant set out as the cause of the killing were done negligently, recklessly, wantonly and willfully. Evidence was offered showing that the place in question was open and was used by hundreds of pedestrians, and that the engineer knew when he "kicked" the car down the track without any brakeman or light upon it, that "swarms" of people were then passing over the tracks in every direction, but that he did not know of the accident until he was told of it. The trial court refused to take the case from the jury, and instructed, in substance, that they should not find the defendant liable unless they believed from the evidence that it was guilty of a degree of negligence so gross as to amount to a willful, reckless and wanton disregard of the rights and safety of Mrs. O'Neill; that the negligence should be such as to justify the presumption of willfulness or wantonness on the part of the defendant. A verdict and judgment against the railway company was affirmed by both this and the Supreme Court, the latter court holding that it would have been an invasion of the province of the jury to instruct to find the defendant not guilty, and said that "the cases cited by appellant, where trespassers upon the right of way of the railroad company have been injured, are here only remotely in point. * * * If the jury believed from the evidence that the servants of the appellant uncoupled this car while it was running several miles an hour, and sent it down the track in question in the darkness without a light upon it and unattended by a brakeman, and at a time and place when and where, as they well knew, great numbers of people employed in the adjacent establishments were passing in all directions on their way home, their finding

that the injury was recklessly and wantonly inflicted can not, on this record, be disturbed by this court."

It will be noted that in the Bodemer and O'Hara cases there was some question as to whether the place of accident was the private right of way of the railroad company; but in the O'Neill case the allegation was that the place of the accident was "an open place," "a public place open to the public," and the proof was that the place was open and was used by hundreds of pedestrians, and that the engineer knew when he "kicked" the car down the track without a brakeman or light upon it, that "swarms" of people were then passing over the track in every direction.

In this case there was a conflict in the evidence as to there being a light on the car, which presented a question for the consideration of the jury, and that question, in connection with the evidence of there being no pickets on the stone wall at the foot of 25th street, when the pickets were on the wall both north and south of that street, also of the steps leading up from the street to the top of the wall, and the coupling pins on the opposite side of the steps, thus making a means of passage across the wall, together with the offered evidence that great crowds of people were constantly crossing the tracks at this point between 7 and 9 p. m., and that thousands were constantly passing up and down the lake shore immediately east of defendant's tracks between those hours, would have made a case for submission to the jury to determine, from all the facts and circumstances, whether defendant was guilty of negligence, and if so, whether the acts constituting such negligence were, to use the language of Judge Bailey in the O'Hara case, *supra*, "liable to the construction of being in wanton and willful disregard of the rights and safety of the public generally, so as to amount in law, to wanton and willful negligence." As to such a case we are inclined to think that reasonably fair-minded and honest men might differ in their conclusions, and if such a state of circumstances shows wanton and willful negligence, which, in the first instance, was a question for the jury, the plaintiff would not be precluded

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from a recovery because he was a trespasser on defendant's tracks.

For the error in excluding the evidence mentioned and in directing a verdict for defendant, the judgment is reversed and the cause remanded.

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Samuel E. Gross v. Mary E. Arnold et al.

1. **CONTRACTS**—*By Agent Subject to Approval by the Principal.*—A contract for the sale of real estate made with an agent subject to approval by his principal does not become a binding contract until it is so approved.

Bill to Cancel Notes, etc.—Trial in the Superior Court of Cook County; the Hon. HENRY V. FREEMAN, Judge, presiding. Hearing and decree for complainant. Appeal by defendant. Heard in this court at the March term, 1898. Decree modified and affirmed. Opinion filed July 21, 1898.

STATEMENT.

The appellees, Mary E. Arnold and C. H. Arnold, sought by their bill of complaint to have returned to them the sum of \$10 and to have canceled certain notes given by them to appellant, Samuel E. Gross, for two lots in West Grossdale, and to have vacated a judgment entered upon one of the notes.

On the 4th of August, 1896, James, who was then engaged in selling lots for appellant, invited appellees to accompany him to West Grossdale to inspect the lots which he was offering for sale on behalf of appellant at that place. They accepted the invitation, and all three went together to West Grossdale. After looking over the ground, two lots were fixed upon as property for the purchase of which appellees were willing to negotiate. The price of the two lots was \$3,500. Appellees offered \$3,100. James expressed doubts as to whether or not that offer would be accepted, but proposed to submit it to appellant, Gross. In pursuance of

that proposition a written application was made out upon one of the blanks for such purpose produced by James. The application was signed by appellees. A deposit of \$10 was then placed in the hands of James, who then gave appellees a receipt for the \$10. The receipt stated that the money was deposited in accordance with application to purchase the lots in question at the price of \$3,100; and stated further that the price, terms and conditions of the application were subject to the written approval of S. E. Gross, and if not approved the money to be refunded by the undersigned. The receipt was signed "S. E. James." James and the Arnolds then returned to the city and together they proceeded to the office of S. E. Gross. James then, in the presence of the Arnolds, reported the matter and handed the \$10 and the application to his immediate superintendent, Taylor. Taylor thereupon passed the matter over to G. H. McDonald, who was the general superintendent in the sales department, handing, at the same time, to McDonald the \$10 and the written application. After some discussion as to the price between McDonald and the Arnolds, McDonald concluded to accept the offer, but subject to Gross' approval. The business was then turned over to other employes of appellant, who proceeded at once to draft papers, viz., notes for the payments as agreed upon, and duplicate articles of agreement whereby Gross covenanted to convey the property to Mary E. Arnold upon the making of the payments specified in the articles, and she covenanted to make those payments. The deferred payments provided for in the articles were evidenced by notes therein described as signed by Mr. and Mrs. Arnold. The remaining payment, described as a cash payment of \$1,000, the receipt whereof was acknowledged, was made up of the \$10 above mentioned and a note for \$990, which note was to have been paid upon the day following, namely, upon August 5th. Mrs. Arnold was to call upon August 5th, pay the \$990 note, and then receive her duplicate of the articles of agreement. The notes were then signed by Mr. and Mrs. Arnold, and the duplicate articles of agreement were signed

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by Mrs. Arnold. The papers so signed were left in possession of Sanford, assistant manager of appellant's office. The name of S. E. Gross was afterward signed to the articles by William J. Moore, the regular manager of the business. Moore had verbal, but not written, authority from Gross to sign. The exact time of the fixing of this signature does not appear. By stipulation, in the record, it is established that the signature was attached in the manner and by the authority above stated; but neither by the stipulation nor by any evidence does it appear when the signature was so attached. Mrs. Arnold failed to call at the office of Gross upon the 5th to take up the \$990 note. James called upon the Arnolds upon the morning of that day, and Mrs. Arnold expressed an unwillingness to proceed with the matter. There was a conflict of testimony as to whether the reason given was, as she and her husband state it, want of hydrant water, or, as the other witnesses state it, an inability to meet the future payments. On the next day, that is, August 6th, James, accompanied by Taylor, again called upon her; she again expressed an unwillingness to proceed (the reason therefor being, as in the case of the first interview, a matter of controversy); she repaid to James one dollar, loaned her on the occasion of the deposit being placed in his hands at West Grossdale, and said that Gross might keep the deposit. About a week after the first transaction, that is, about a week after August 4th, McDonald called upon her, when she again repeated her unwillingness to proceed with the contract. She called at appellant's office about the 14th of August and asked for a copy of the contract; but, as she had not paid the \$990 note, her duplicate of the articles was not furnished her. On August 14th Gross caused judgment to be entered upon the \$990 note. On August 26th the first bill in this case was filed. That bill was framed for the purpose of rescinding the contract, as was the amended bill which followed it, and was filed September 28th. The final amendment was filed November 14th. In the meantime, but after the filing of the first bill and before the filing of the final amendment, Gross, in person, over his own sig-

nature, by an indorsement on the articles of agreement, formally approved the contract.

The bill, as originally filed, charged fraud in the procuring of the agreement to purchase, and sought to have it set aside upon that ground. The bill, as finally amended, alleged that the agreement was subject to approval in writing by Gross, and that before such approval appellees withdrew their offer; that no contractual relations had ever been created between themselves and appellant, and sought to have the deposit returned, the notes canceled, and a judgment entered upon one note vacated. The evidence was partly heard upon the issue as to fraudulent representations before the final amendment was filed.

The master, to whom the cause was referred to take testimony and report conclusions, recommended that the bill be dismissed for want of equity. The court sustained certain of appellees' exceptions to the report of the master, and entered a decree as prayed by the amended bill. The master and the court each find, in effect, that no fraudulent representations were made and that no relief upon that ground could be granted. The court, however, found that no contract was ever actually entered into by the parties, because the offer was withdrawn and rescinded before approval by appellant, Gross.

YOUNG, MAKEEL & BRADLEY, attorneys for appellant.

When one of the parties signs a contract and the other orally accepts it both are bound. Bishop on Contracts, Sec. 342.

An assent, however, may bind the party, although not express or in writing, if it can be fairly inferred from his profiting by the stipulation of the contract. 1 Parsons on Contracts, 476.

An agreement to sell land, signed only by the vendor, who, after signing and before suit, gave notice of his desire to rescind, was held binding in a suit brought by vendee for specific performance, the statute of frauds being satisfied by the signature of the party to be charged, and the

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question of mutuality being satisfied by the bringing of the action for specific performance. *Ives v. Hazard*, 4 R. I. 25.

A writing containing the terms of a contract between two parties, when signed by one and accepted by the other, becomes the contract of both. *Brandon Mfg. Co. v. Morse*, 48 Vt. 326.

Where one only signs a written contract he is bound if the other accepts and performs acts under it. *Fairbanks v. Myers*, 98 Ind. 92.

A written contract by one to sell to another upon condition of electing within a certain time to buy is binding if the election be made within the specified time. *Mansfield v. Hodgdon*, 147 Mass. 307.

Where, from the face of a paper, the parties to a contract are plainly indicated, if one of the parties sign and the other perform acts tantamount to an acceptance, it becomes binding upon both, and is to all intents and purposes the written agreement of both. *Ames v. Moir*, 130 Ill. 589.

Among the acts which are held to amount to an acceptance, so as to obviate the failure of one of the parties to attach his signature, is the commencement by that party of a suit to enforce performance of any of the terms of the contract. *Estes v. Furlong*, 59 Ill. 302; *Short v. Kieffer*, 43 Ill. App. 521; *Ives v. Hazard*, 4 R. I. 28.

STRONG, STRUCKMANN, EHLE & MILSTED, attorneys for appellees.

Among the necessary elements of a valid contract, are a distinct communication by the parties to one another of their intention, or, in other words, proposal and acceptance, and that there must be a genuineness in the consent expressed to the proposal and acceptance. *Anson on Contracts*, 10.

A secret acceptance of a proposal can not constitute an agreement. It must be communicated to the proposer. *Anson on Contracts*, p. 2, Sec. 3; *Am. & Eng. Enc. of Law*, Vol. 3, 856; *White v. Corlies*, 46 N. Y. 467; *Jenness v. Mt. Hope Iron Co.*, 53 Me. 20.

The most essential element of agreement is the consent of the parties. If two or more parties express their consent to a common purpose, with a view to forming a contract, this is an agreement. An agreement usually consists of an offer by one party and an acceptance by the other. Indeed, every agreement may be reduced to an acceptance of an offer. Am. & Eng. Enc. of Law, Vol. 3, 841.

A proposal may be revoked at any time before acceptance. Am. & Eng. Enc. of Law, Vol. 3, 850; *Stitt v. Hindikopers*, 17 Wall. 384; *Warvelle on Vendors*, Vol. 1, 138, 140; *McDonald v. Bewick*, 51 Mich. 79.

It is not essential that notice of withdrawal of an offer should be in writing or accompanied by any formalities, provided the fact of notice is brought home to the other party. It may be by word of mouth, or by an act of either party, that prevents performance of the mutual understanding. *Warvelle on Vendors*, Vol. 2, p. 883.

Where an offer is not accepted before it is withdrawn, there is no binding contract. *Lincoln v. Gay*, 164 Mass. 537.

Where withdrawal of proposal is shown, it is presumed to be in time until the contrary is shown. *M. E. Church v. Sherman*, 36 Wis. 404; *Johnson v. Filkington*, 39 Wis. 62; *Moore v. Flynn*, 135 Ill. 74.

If either party neglects to bind himself, the instrument is void for want of mutuality, and the party who is not bound can not avail himself of it as obligatory upon the other, nor can he, by subsequent ratification, bind the other without his consent, and the fact that a deposit is made is immaterial. *Dodge v. Hopkins*, 14 Wis. 630; *Townsend v. Corning*, 23 Wend. (N. Y.) 435.

Mutuality is a necessary element of contracts. *Chitty on Contracts*, 297; *Bishop on Contracts*, 32; *Wharton on Contracts*, 5; *Vogel v. Pekoc*, 157 Ill. 342.

Even though the writing is signed by the party to be charged, in accordance with the statute of frauds, there must also be an acceptance by the other party, and, prior to such acceptance, the proposal may be withdrawn. *Perkins v. Hadsell*, 50 Ill. 217.

MR. JUSTICE SEARS delivered the opinion of the court.

It is undisputed that the agreement, made at the time of the payment of the \$10, and the giving of the receipt therefor, was made subject to the written approval of appellant, S. E. Gross. James, called as a witness by appellant, testified: "I made the price \$3,100, subject to Mr. Gross' approval." The receipt given at that time reads as follows: "Received of Mr. and Mrs. C. H. Arnold, ten dollars, deposited in accordance with application to purchase lots 8 and 9, block 2, Sub. 49, price \$3,100. Price, terms and conditions of said application are subject to the written approval of S. E. Gross, and if not approved, money to be refunded by the undersigned, but if approved, to be closed189....., or above deposit forfeited.

(Signed) S. E. JAMES."

It is also undisputed that McDonald, the general superintendent of appellant's sales department, told appellees when the papers were signed, that the transaction was still subject to approval by Mr. Gross. He testified: "I told her I would pass the deal subject to Mr. Gross' approval. If he would not accept of it, of course her money would be returned to her; and then instructed Mr. Sanford to draw papers for them to sign." The papers referred to were the articles of agreement and notes in question. The same witness testified: "The contract was subsequently approved by Mr. Gross when he signed it."

No approval in writing was made by Gross until after this suit was begun. It was stipulated between the parties as follows: "That the indorsement written upon the instrument as follows, 'I hereby ratify the within contract, Samuel E. Gross,' was written and signed by Gross after the original bill in this case was filed, but before the last amendment was filed." It is, in effect, undisputed that on August 5th and 6th, the two days following the payment of the deposit, the giving of the receipt and the making of the papers, the Arnolds informed James, the agent through whom the transaction was carried on for appellant, that they would not make the purchase. James testified: "I

called the next morning; she said she was afraid they could not take them; that Mr. Arnold had got up in the night and figured on the interest, and she thought it was more than they could meet, and she wanted to think of it another day. * * * I called again the next day, that is the second day after the sale. * * * She guessed she would throw them up entirely, or something like that; she guessed she would let them go and let Mr. Gross have the \$10 that she had paid." C. H. Arnold testified: "When James called the next morning, Mrs. Arnold told him she couldn't take the lots; that there was no water on them. * * * He offered to pay the first year's interest on it himself. I told him that was not material, I would not fulfill the contract." Mrs. Arnold testified: "What happened next day in my dealings with Gross' representative was, I told him I found out there was no water, and they told me all improvements were in. I told him it was too much money; told him we would not carry out the contract."

We are of opinion that the evidence very clearly sustains the following findings of the chancellor: "That it was expressly agreed and understood between complainants and the said agents that the said articles of agreement were taken by said agents subject to the approval of said defendant, S. E. Gross, which approval was to be made in writing; and it was further expressly understood that in case said agreement to purchase should not be approved by said Gross as aforesaid, then the said deposit of \$10 paid by complainants as alleged in the amended bill should be returned to them, and the articles of agreement and notes canceled and destroyed; that before the offer of complainants was accepted or approved by Gross, complainants notified the agents of Gross that they withdrew the offer and refused to carry out the provisions of same, and would not make any of the payments provided for therein; that the offer made by complainants was thereby rescinded, and that there was never any contract relation between complainants and defendant, Gross; that the articles of agreement, the notes and the deposit of \$10 were obtained from the complainants

by the agents of defendant and by the defendant without any consideration, and that the articles of agreement are void and of no effect; that the confession of judgment was entered without right or authority and is of no binding force or effect."

The decree entered by the court necessarily followed from these findings.

It is urged by counsel for appellant that the court should have found that the approval by Gross, which was contemplated by the parties when the papers were signed, was a distinct approval, and not of necessity in writing. We think that the court found correctly, and that it appears from all the evidence that the approval contemplated was such approval as was specified in the receipt, viz., written approval. Such evidently was the view taken by the parties themselves, for Gross did approve in writing, after suit begun, and in such writing said, "I hereby ratify the within contract." McDonald so viewed it, for he testified that the contract was subsequently approved by Gross "when he signed it."

If, however, it were conceded, as contended for by counsel, that any distinct approval by Gross, whether in writing or not, by him personally or through Moore acting for him, would suffice, yet we can not see how the result could be any different. The contract, *i. e.*, articles of agreement for purchase and sale, were certainly not approved before they were executed by Moore, the general manager of appellant's office. It appears that Moore did not sign them upon August 4th, the day of the making of the deposit and signature by the Arnolds. It is so stated by counsel for appellant in their brief, and although it does not appear from the abstract, we assume the statement to be correct. It does not appear, therefore, that the articles of agreement were approved or even executed by any one on behalf of Gross, when, on the 5th and 6th of August, the Arnolds withdrew their offer and refused to buy. It lay in the power of appellant to show just when the signature by Moore was made. In absence of such showing, and it appearing that

it was not made at the date of the articles, *i. e.*, upon August 4th, no presumption will obtain that it was done before the rescission by appellees. It can not be maintained that there could be an approval by Sanford before execution by Moore. But we are of opinion that the approval contemplated by the parties was such an approval as was attempted to be effected by Gross after the beginning of this suit, *viz.*, an approval in writing. Until such approval the contract was not yet entered into by appellant and hence neither by appellees.

Awaiting the execution of the articles of agreement by Gross, either personally or by agent with his written approval of the same, the papers were merely left in escrow in the hands of one of his employees. Before a contract had become binding upon Gross, the appellees elected to withdraw their offer.

It is urged by counsel for appellant that even if appellees are entitled to the relief granted as to the judgment and notes, yet the decree should not have awarded a return of the \$10. Counsel for appellees concede that the decree be modified to the extent of this award. Without passing upon the propriety of the decree in this behalf, and solely upon the suggestion of counsel, we modify the decree by striking out that portion which decrees the payment of the \$10 by appellant, and in all other respects the decree is affirmed.

Appellees will recover their costs. Decree affirmed.

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**Winkle Terra Cotta Co., John McEwen, Jr., and Paul
McEwen v. Antonia Homersky, Adm'r.**

1. MASTER AND SERVANT—*When the Master is Not Responsible.*—Where a servant is doing his work in a way not contemplated by his employer and not in accordance with his contract of employment, whatever the hazards of the work may be, they are assumed by the servant of his own free will, and his employer can not be held responsible to him for the consequences.

Winkle Terra Cotta Co. v. Homersky.

Trespass on the Case.—Death from negligent act. Trial in the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in the Branch Appellate Court of the First District at the October term, 1897. Reversed. Opinion filed May 31, 1898.

STATEMENT.

This is a suit brought by the appellee as administratrix of her husband, August Homersky, who is alleged to have been killed while in the employ of the Winkle Terra Cotta Company through the negligence of the defendants. Appellants John and Paul McEwen were contractors engaged in the erection of a four-story building. They contracted in writing with the terra cotta company as sub-contractor to furnish and put in place the terra cotta for the building, including a cornice. This cornice extended along the top of the building and was about sixty feet from the ground. The contract for setting the cornice provided that the "scaffolding, mortar, iron anchors and hoisting of material" were to be furnished by the McEwens. These anchors are said to have been furnished, but as the terra cotta was a little thicker than the plans required, did not fit and were not used. Upon the morning of the accident, the four men employed by the terra cotta company to set the cornice, including the deceased, were at the building at eight o'clock ready to work. As the anchors were not there, or, if there, were not suitable for the use intended, for the reason stated the men waited and did not go on with the work. About ten o'clock the general superintendent, Reed, employed by the original contractors, came around and complained vigorously because the work was not going on. The foreman of the terra cotta company explained that he was waiting for anchors, and did not want to put up the remainder of the cornice without them. But Reed, it is claimed, insisted, and finally the men concluded to go on without the anchors and did so until about 3:30 P. M., when a heavy section of the cornice was pulled or fell upon the scaffold, throwing the deceased to the ground, causing his death. A verdict was obtained and judgment rendered against the defendants,

who prosecute separate appeals, which, by stipulation, have been consolidated.

EDWARD S. CURTIS and WM. M. JOHNSON, attorneys for appellant, the Winkle Terra Cotta Company.

The master has the right to assume the servant has knowledge of the character and location of structures which he is familiar with and had an opportunity to ascertain. Negligence arises out of failure of duty. No warning is required where a defect is known and danger therefore appreciated. It is not failure of duty on the part of the master to expose a servant to risks and dangers which the servant fully comprehends and appreciates and which he is willing to assume. *Bailey, Master's Liability to Servants*, Chap. II, p. 198.

The servant is presumed to know the nature of the employment upon which he is entering and the ordinary risks which he will run. He is not bound to continue in an employment in which he runs serious risks, and if he does he must take things as he finds them. *Whittaker's Smith on Negligence*, p. 133.

The servant is bound to see patent and obvious defects in machinery or other instrumentalities of the business, and when he goes into the service of a person, knowing that the instrumentalities employed are unsafe and dangerous, he takes the risk of their use upon himself, and can not hold the master responsible for injuries resulting therefrom. It may be inhuman to expose workmen to peril and risk of their lives, but it does not create a right of action for an injury when the workman knows all the facts. *Wood's Master and Servant*, Sec. 355.

It has come to be well settled that the master may conduct his business in his own way, although another method might be less hazardous, and the servant takes the risk of the more hazardous method as well, if he knows the dangers attending the business in the manner in which it is carried on. *Bailey*, Chap. 9, p. 145.

The servant, knowing the hazards of his employment, can

Winkle Terra Cotta Co. v. Homersky.

not maintain an action against the employer because he may be able to show there was a safer way in which the business might have been carried on, and that had it been conducted in that way he would not have been injured. *Gilbert v. Guild*, 144 Mass. 601; *Sullivan v. India Mfg. Co.*, 113 Mass. 398; *Simmons v. Chicago & Tomah R. R. Co.*, 110 Ill. 347.

If a servant voluntarily puts himself in place of danger the master is not liable. *Felch v. Allen*, 98 Mass. 572; *Sprong v. B. & A. R. R. Co.*, 60 Barb. (N. Y.) 30; *Corbin v. American Mills*, 27 Conn. 274.

If a workman is engaged in service of peril, if the danger belongs to the work itself or to the service in which he engages, he will be held to all the risks which belong to either. *Perry v. Marsh*, 25 Ala. 659; *Baxter v. Roberts*, 44 Cal. 187; *Indemaur v. Davies*, L. R. 2 C. P. 313; *Gibson v. Pac. R. R. Co.*, 46 Mo. 163; 2 Am. Rep. 497; *Cumberland R. R. Co. v. State*, 44 Md. 283; *Leonard v. Collins*, 70 N. Y. 90; *DeGraff v. N. Y. C. & H. R. R. Co.*, 76 N. Y. 125; *Evans v. L. S. & M. S. Ry. Co.*, 12 Hun, 289.

SCHUYLER & KREMER, attorneys for the appellant McEwen; D. J. SCHUYLER, of counsel.

S. P. DOUTHART and J. J. KELLY, attorneys for appellee.

Where the injury is the result of the negligence of the defendant and that of a third person, or of the defendant and an inevitable accident, or an inanimate thing has contributed with the negligence of the defendant to cause the injury, the plaintiff may recover, if the negligence of the defendant was an efficient cause of the injury. 2 Thompson on Negligence, 1085, Sec. 3; Bishop on Non-Contract Law, Secs. 39, 450, 452; Shearman & Redfield on Negligence, Sec. 31 *et seq.*; *Carterville v. Cook*, 129 Ill. 152.

MR. JUSTICE FREEMAN, after making the foregoing statement, delivered the opinion of the court.

The negligence charged in the declaration, for which it is sought to hold appellants responsible, consists in the alleged

failure of the McEwens to supply, and of the terra cotta company to use, anchors which, it is claimed, were intended to and would have held the cornice in place and prevented the accident.

In the view we are compelled to take of the case it will not be necessary to discuss at length the question whether the appellants or either of them were guilty of such negligence in these respects as would entitle appellee to the judgment in her favor. It is, we think, sufficiently clear, and it seems to be conceded by appellants' counsel, that there was danger that the cornice would not remain in place when completed unless the anchors were put in as the contract provided. There was, therefore, great risk in proceeding with the work, adding piece after piece to the weight of the cornice, and taking the chances of its fall. It is said that only about twenty-five feet of it actually fell, and more than seventy-five feet of it remained in place, notwithstanding all of it alike was destitute of anchors. Nevertheless, the fact that any of it fell, as it evidently did, may be conceded to indicate the impropriety of proceeding with the work as was done, without the protection which the anchors were intended to afford.

The testimony tends strongly to show that the immediate cause of the accident was that the deceased, perhaps in consequence of bending down after mortar, made a misstep or slipped; that to save himself, he caught at the cornice, which gave way under his hand, and fell over upon him, knocking him from the scaffold, and breaking the latter with its weight. This is in accordance with the testimony of those whose position at the time enabled them to have the best opportunity of knowing the facts, and who seem most worthy of credence as to that matter. There is also evidence given by the foreman who was called as a witness by appellee, that deceased was told not to use his hammer so much on the cornice just before the accident, and replied, "Oh, it can't be knocked down that way."

It is contended in behalf of appellants' counsel that whatever negligence there was, if any, on the part of appellants,

Winkle Terra Cotta Co. v. Homersky.

or either of them, in not furnishing or using the anchors, the actual and proximate cause of the accident was the use of his hammer by the deceased and the slip or misstep which caused him to seize the cornice, thus pulling it down upon him.

However that may be, the controlling question here is, whether the deceased voluntarily assumed the danger and entered upon the work of his own accord.

There are certain facts which seem to be undisputed, and are included in the statement made by appellee's counsel in their brief. It is conceded that the Winkle Terra Cotta Company was a sub-contractor engaged in setting the cornice at the time of the accident, and that deceased was in its employ. He had been working for said company putting up the terra cotta work on this building for about two weeks. The morning in question, the workmen employed by the terra cotta company were on hand at eight o'clock ready to put up the cornice. They remained idle, waiting for the anchors until about ten o'clock. At that time Reed, the general superintendent of the building, representing, not the terra cotta company, but the original contractors, John and Paul McEwen, came around and found the men employed by the terra cotta company doing nothing. He was told by the foreman of the latter, in the presence of the deceased and his fellow-employees, that as he, the foreman, had "no anchors up there," he would not "start in." Reed insisted that the terra cotta company's men should go to work, and said that he would be responsible for the job; that if they did not go on he would get some one else. Finally the foreman said to his men, including the deceased, that they had heard what Reed said, and if they wanted to go to work they could do so. The men were anxious to go on because, as the foreman testifies, "the superintendent was raising hell with them." At length the men concluded among themselves that "the cornice would stand without anchors." One of the men testifies that he said, "On my part I will go to work if Mr. Reed is responsible for the work." Accordingly they all went to work putting up the

cornice without the anchors, and continued at it from ten o'clock in the forenoon until the accident, which occurred about 3:30 P. M.

From this state of facts it is apparent that the men were doubtful of the propriety of going on without the anchors, but concluded that if Reed, representing the contractors for the building, was willing to take the responsibility of its falling and spoiling the job, they, as employes of the terra cotta company, would take the risk of putting up the cornice. They were not ordered by the foreman of the terra cotta company, to whom alone they were responsible, to go on with the work. They were given their free choice about the matter, and settled it among themselves. They took the responsibility of doing the work in a manner not contemplated by their employer and without said employer's knowledge or consent. For there is no evidence that the foreman, Freygang, had any authority except to do the work in accordance with the plans and specifications which provided for the use of anchors. His refusal to do the work without anchors in the first place, and his leaving the matter to the men to determine, tend to show that he did not regard himself as having such authority.

If their going on with the work without anchors under these circumstances was negligence the negligence was clearly and wholly their own. It is not a question as to whether by the contract of employment they assumed any other risks and perils than those which are obvious to a person of ordinary understanding, with opportunity for observation.

It is not necessary to consider whether the deceased and his fellow-workmen assumed a risk not apparent to ordinary observation at the time. They knew they were doing the work in a way not contemplated by their employer, and not embraced in their contract of employment. See *Felch v. Allen*, 98 Mass. 572. Whatever, therefore, the hazards may have been, they were assumed by the workmen of their own free will, and their employer can not be held responsible to them for the consequences. See *Camp*

Webster Mfg. Co. v. Schmidt.

Point Mfg. Co. v. Ballou, 71 Ill. 419; Abend v. T. H. & I. R. R. Co., 111 Ill. 209; Penn. Co. v. Lynch, 90 Ill. 333.

Doubtless the conduct of Reed, the general superintendent for the McEwens, may have been reprehensible when he insisted that the work go on without waiting for the anchors. His conduct may have been inexcusably reckless. But he had no control over the men employed by the terra cotta company, and the relations of that company to his principals were regulated by an independent written contract. Probably he ought not to have urged that the work go on without anchors. He may, if he agreed to assume the responsibility in case the cornice should fall, have undertaken to make his principals liable to the terra cotta company for the damage it sustained. But his principals are not liable to the men for the consequences of the voluntary act of the latter, nor for the negligence, if any, of the independent contractor. *Jefferson v. The Jameson and Morse Co.*, 165 Ill. 138.

There is no evidence here that the deceased and his fellow employees were ignorant of the risk they assumed, or that they were lacking in ordinary intelligence. The consequences of the accident are deplorable, especially to this appellee and her children, thus deprived of a husband and father. But unless the employer is to be held an insurer of his employees against their own acts, no recovery can ever be had in this case. For this reason it is our duty to put an end to litigation, which can never benefit the appellee. The judgment of the Circuit Court will therefore be reversed without remanding.

Webster Manufacturing Co. v. Mathias Schmidt.

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1. MASTER AND SERVANT—*Duty of the Master.*—It is the duty of the master to use all reasonable care to employ competent and prudent co-employees.

2. SAME—*When One Employee Has Knowledge of Another's Incom-*

petency.—When one employe has knowledge of the incompetency of another, but continues in the service until he is injured through such incompetency, he can not recover.

8. *ADMISSIONS—Of Persons Suing for Personal Injuries*.—Where a person suing for personal injuries makes a statement in writing, purporting to show how the injuries occurred, admissions in such statement are competent evidence against him on the trial of the case.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in the Branch Appellate Court of the First District, at the October term, 1897. Reversed and remanded. Opinion filed May 31, 1898.

STATEMENT.

Appellee sued to recover damages for personal injuries received while in the employ of appellant, caused by the operation of a steam hammer, which descended prematurely, and cut off the first joint of the index finger of appellee's right hand, injuring at the same time the second joint of the same finger. The injury is said to have been caused by the carelessness of a boy employed to operate the hammer; and appellant is charged with negligence in placing an unsuitable person of immature age, who is alleged to have been unskillful, careless and negligent, in charge of its operation.

JOHN A. POST and CHARLES B. STAFFORD, attorneys for appellant.

JESSE COX and JENS L. CHRISTENSEN, attorneys for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

It is the duty of the master to use all reasonable care to employ competent and prudent co-employees. Consolidated Coal Co. v. Haenni, 146 Ill. 614.

The negligence charged against appellant involved questions of fact; first, whether the boy employed to operate the steam hammer was or was not immature, unskillful and careless; second, whether, if the boy was incompetent,

appellant knew, or in the exercise of reasonable care and diligence should have known, that he was not a sufficiently careful and prudent person to be put in charge of such work; third, whether appellee knew, and whether he could have known by the exercise of ordinary care and observation, of the alleged incompetency of the boy; fourth, whether appellee by his own negligence contributed to the injury.

These were questions for the jury. There was testimony tending to show that the boy in charge of the operation of the lever controlling the steam hammer was about sixteen or seventeen years of age; testimony upon both sides relating to his competency for that work; testimony tending to show that the boy's father was foreman for the appellant and knew of conduct alleged to indicate his son's carelessness and incompetency; and there was also evidence relating to alleged contributory negligence of the appellee, and to appellee's knowledge of the alleged incompetency of the boy. The rule is that when one employe has knowledge of the incompetency of another, but continues in the service until he is injured through such incompetency, he can not recover. *Frazer & Chalmers v. Schroeder*, 163 Ill. 459.

If the case was properly submitted to the jury, their finding as to matters of fact, if not influenced by passion or prejudice, should not be interfered with.

Counsel for the defendant offered in evidence a statement in writing signed by the appellee purporting to show how the injury occurred. To the introduction of this statement appellee's counsel objected and the court sustained the objection, to which appellant's counsel duly excepted. This was error. When appellee identified the paper and his signature thereto containing a statement showing how the accident occurred, any admissions it contained became competent evidence against him. If to break the force of such admissions his counsel desired to show that the signature was procured by fraud or attached by mistake, or that appellee when signing the statement did not know or understand its contents, this could be done. But the statement should have been admitted.

Subsequently, on rebuttal, appellee's counsel asked to see the statement, and appellant's counsel refused to produce it for his inspection, stating that it had been ruled out and was not in evidence. The court thereupon reversed the former ruling, stated that it would be considered in evidence, compelled appellant's counsel to produce the paper, told him he might reopen his case, and that both parties might put in everything they desired in reference to that statement. Appellee's counsel then proceeded to cross-examine his own client as to how and when and where the statement was made and signed, including conversations with reference to an insurance company. The position then was this: Appellee's counsel practically was permitted to introduce in rebuttal a statement signed by his own client, to the introduction of which, by appellant, who alone had the right to introduce it, he had before successfully objected; and to bring before the jury, by a process equivalent to cross-examination, testimony as to circumstances which he says in his brief "were so natural and reasonable, and so in accord with the well known methods of accident insurance companies, that there could be no attempt made to contradict it." This statement indicates that appellee's counsel regarded this testimony as prejudicial to appellant, and no doubt it was.

Appellant's counsel have not taken the pains to abstract this paper, and we are not advised, therefore, of its contents. *Shively v. Hettinger*, 67 Ill. App. 278, and cases there cited. But appellee's counsel states that it was "not substantially in conflict with the testimony given in behalf of appellee."

The prejudicial testimony thus improperly admitted, and which was outside of the real issue, as to whether appellant was guilty of negligence, as charged in the declaration, may have been responsible for the rather large damages awarded in the case.

As there must be a new trial, we refrain from further comment on the evidence. The judgment will be reversed and the cause remanded.

New York Bank Note Company v. William R. Kerr.

1. **SURETY**—*When a Judgment Does Not Release*.—Where a person is a surety only, in the acceptance of a draft, the recovery of a judgment upon the draft will not operate to destroy his character as such surety in relation to the principal and the creditor. The only effect of the judgment is to change the form of the security from that of the draft to that of the judgment.

2. **SAME**—*What Acts Will Discharge*.—Whatever acts will discharge the surety before judgment, while his obligation is only one of contract, will have the same effect after it has passed into judgment.

3. **SAME**—*Equitable Relief in Favor of*.—Equitable relief in behalf of sureties is one of original jurisdiction in a court of chancery.

4. **INJUNCTION**—*To Restrain Proceedings in a Suit at Law—Bond*.—When a suit is brought to enjoin proceedings in a suit at law, the amount of the bond is a matter resting in the discretion of the chancellor.

5. **SAME**—*Showing Made to Avoid Giving of Notice*.—Where it appears that a motion to dissolve an injunction was heard by the court and overruled, and upon hearing the defendant was present, and the result there, upon the hearing of all parties, having been the same as reached upon the *ex parte* application, it is conclusive that the defendant was not prejudiced, so far as the question of notice is concerned, by the order of the court entered in its absence.

Bill to Enjoin Proceedings in a Suit at Law.—Trial in the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Hearing and decree for complainant. Appeal by defendant. Heard in this court at the March term, 1898. Affirmed. Opinion filed June 29, 1898.

JAMES JAY SHERIDAN, attorney for appellant; DEFREES, BRACE & RITTER, of counsel.

COLLINS & FLETCHER, solicitors for appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

This appeal is from an interlocutory order, restraining appellant from prosecuting an action at law in Cook county, Illinois. The suit enjoined is upon a judgment recovered by appellant against appellee in the State of New York. The judgment was rendered in a suit upon a draft drawn upon appellee in favor of appellant by one Fish. The bill

alleges that the draft was accepted by appellee merely as surety for the payment by Fish of certain bills for printing and engraving contracted to be done by appellant, and that the contract for the printing and engraving was afterward abandoned and annulled by consent of the parties. The judgment in New York was recovered before the abandonment of the contract. No work was ever done under the contract. It is contended by counsel for appellant that the bill of complaint is insufficient. The bill evidently proceeds upon the theory that appellee having been a surety only in the acceptance of the draft, the recovery of a judgment upon the draft did not operate to destroy his character as such in relation to the principal and the creditor, and that the only effect of the judgment was to change the form of the security from that of the draft to that of the judgment. We think that this position is sustained by the authorities. *Trotter v. Strong*, 63 Ill. 272; *Carpenter v. King*, 9 Metc. 511; *Keighler v. Savage Mfg. Co.*, 12 Md. 383; *Gustine v. Union Bank*, 10 Rob. (La.) 412; *Ames v. Maclay*, 14 Ia. 281.

If, therefore, after the judgment was recovered the contract was abandoned by consent of the parties thereto, and without anything done in execution of it, and thereby the principal was discharged, it operated in equity to discharge the surety as well.

In *Trotter v. Strong*, *supra*, the court said: "Some cases have held that, after the contract has been reduced to a judgment, the equity of the surety terminates with regard to the creditor and the prior obligation, in the new one created by the law. These cases proceed upon the ground that such equities can be shown neither when the contract is under seal nor when it has been reduced to a judgment. But other cases hold that, as the equity of the surety against the creditor is founded upon that which exists between himself and the principal, it survives the judgment. It is difficult to see why the surety should be protected against the interference of the creditor by dealing with the principal to the injury of the surety, before, and can not be after, the judgment is rendered. To give time or to discharge the principal after judgment would be as injurious

to the surety as before judgment. In either case the injury is the same, and why not have the same protection? * * * Some cases favor the doctrine that whatever acts will discharge the surety before judgment and while his obligation is only one of contract, will have the same effect after it has passed into judgment (citing authorities); and the rules seem to be more consonant with reason and justice. It prevents wrong and injury, protects the surety in his just right to look to his principal for indemnity when he is damnified by his undertaking, and prevents the creditor from discharging the principal and imposing the entire burden upon the surety without means of redress."

Equitable relief in behalf of sureties is one of original jurisdiction in a court of chancery. *Viele v. Hoag*, 24 Vt. 46.

It is also contended by appellant that no notice of the application for an injunction was given and no sufficient showing made to avoid the giving of notice.

But it appears that a motion to dissolve was heard by the court and overruled. Upon that hearing appellant was present and the result there, upon hearing of all parties, having been the same result which was reached upon the *ex parte* application, it is conclusive that appellant was not prejudiced, so far as the question of notice is concerned, by the order of the court entered in its absence. *O'Kane v. West End Dry Goods Store*, 72 Ill. App. 299.

Nor is the decision in *Mexican Asphalt Co. v. Asphalt Paving Co.*, 61 Ill. App. 354, in any way in conflict as suggested by counsel. In that case it was held that objections generally to the order are properly presented to the court below by motion to dissolve before resorting to an appeal from the order, and that by such motion the right of appeal is not prejudiced. The objections in that case went to the sufficiency of the bill. The decision does not pass upon objections based merely upon lack of notice, *i. e.*, lack of opportunity to be heard, or the effect upon such objections of a showing that before appeal the party objecting has been heard without changing the conclusion of the court.

It is also urged that the bond is insufficient. The order

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does not operate to enjoin a judgment, but to enjoin proceedings in a suit at law. The amount of the bond was a matter resting in the discretion of the chancellor. *Kohlsaat v. Crate*, 144 Ill. 14.

The order is affirmed.

United States Express Co. v. John McCluskey.

1. **ORDINARY CARE—*No Recovery Without.***—A person can not recover for personal injuries unless he was in the exercise of ordinary care for his own safety, and the injury resulted from the negligence of the defendant.

2. **SAME—*Injuries Must Be Attributable to Defendant's Negligence—Contributory Negligence.***—The injury must be attributable to the defendant's own negligence, and to that alone; if occasioned in any degree by the plaintiff's negligence he is without redress.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in the Branch Appellate Court of the First District, at the March term, 1898. Reversed. Opinion filed July 16, 1898.

WILLARD & EVANS, attorneys for appellant.

E. S. CUMMINGS, attorney for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This was an action by appellee to recover damages for personal injuries. It is contended that the verdict is manifestly against the weight of the evidence; that there was no negligence on the part of the driver of the wagon; that the negligence of appellee was not only contributory, but the actual cause of the accident; and that the Circuit Court erred in refusing to instruct the jury to find a verdict for the defendant.

The accident occurred about 2 P. M. of October 21, 1893. Appellee had left the northwest corner of Clark and South Water streets, Chicago, and started east to cross Clark street. The wagon of the express company was upon the west track of the street railway company, coming down the

77	56
84	689
77	56
99	531
77	56
106	188
77	56
115	114

incline from the bridge, with other wagons behind it. One of these latter "seemed to be in a greater hurry than the express wagon, which was immediately before it," and pulled out from its place in the rear into the vacant space between the curb and the car track. Appellee saw this wagon pull out of the line, and says he crossed in front of it, "intending to stay there for an opportunity to cross again through the space made vacant where this wagon pulled out." He had plenty of time, according to his statement, to pass in front of the wagon which had thus pulled out of line, but there was another wagon backed in there standing diagonally, and the advancing wagon "pulled too close to the express wagon" to allow room for him to stand between them. Appellee made no outcry and gave no alarm, but finding himself, as he says, in a trap, started to cross in front of the appellant's wagon, when the latter was so near him that he "had to make a little detour to get in front past the horse." He testifies that the driver was "driving down slowly," and he succeeded in getting nearly over, but was struck and knocked down and was run over by the east wheel of the express wagon.

The statement of the driver does not materially differ as to these facts from that of appellee, except that he says he did see the latter while he, the driver, was coming down the incline. He says: "At the time I saw him he walked * * * within two or three feet of the street car track and stood there. * * * When I was within seven or eight feet of him he stopped. * * * I thought he was going to stay there. He stopped as though he intended to let me pass. Just as I got within two or three feet of him he started to cross, and made a kind of jump forward. I hollered at him, but he went right ahead. * * * He jumped suddenly, as I didn't expect it; he got right in front of the horse."

Appellee's counsel contends that the driver was negligent, because it is said he was driving with loose reins, was engaged in conversation and not "looking where he was going," and because his horse was going at a slow trot. Appellant's testimony is in conflict with that of the appel-

pellee's witnesses in these respects. But assuming that the facts are as claimed by appellee's counsel, it does not appear that such alleged negligence caused or contributed to the accident. Appellee did not start to pass in front of the wagon until it was so close to him that he had to make a detour to get in front of the horse. He did not give any warning of his intention to cross. His conduct gave the driver no reason to suppose that he intended to do so. He says himself that he had not so intended. The horse at the most was going at a slow trot. Apparently appellee was standing in a place of safety. To charge the driver with negligence it would be necessary for him to have notice of the intention of the appellee to cross, "at least long enough before the injury inflicted to have enabled him to have formed an intelligent opinion as to how the injury might be avoided and apply the means." *C., B. & Q. R. R. Co. v. Johnson*, 103 Ill. 512.

It is said that if the driver had been driving with tight lines and slowly, and had been looking at appellee, he would have been able to stop short. There is no testimony to support this contention. It does not appear that the wagon was not stopped as soon as it could be done at the rate of speed with which it was proceeding, and that was slow.

But appellee can not recover in this case unless he was in the exercise of ordinary care for his own safety, and the injury resulted from the negligence of the defendant. *L. S. & M. S. Ry. Co. v. Hessions*, 150 Ill. 546-566.

As has been said, "the injury must be attributable to the defendant's own negligence, and to that alone; if occasioned in any degree by the plaintiff's negligence, he is without redress." *N. J. Exp. Co. v. Nichols*, 33 N. J. L. 434-439; *Chicago City Ry. Co. v. Canevin*, — Ill. App. —, and cases there cited.

It is clear that appellee placed himself in the position of danger which resulted in his being injured. He was not obliged to pass in front of the wagon, which he saw had pulled out of the line, and thus place himself in what he calls a trap. The condition apparently could easily have been foreseen had he looked ahead before starting to cross.

Iroquois Furnace Co. v. Wilkin Mfg. Co.

If, when he found himself in a dangerous place, he had called out to the drivers of both wagons, as he had, apparently, ample time to do, and had then been negligently run down by either of them, a different question might have been presented. This is a case where, in our opinion, the conclusion that the appellee was negligent, and that such negligence contributed directly to the injury, necessarily results from the facts, and the court must say so as a matter of law. *C. & E. I. R. R. Co. v. O'Connor*, 119 Ill. 586-597; *Hoehn v. C. P. & St. L. Ry. Co.*, 152 Ill. 223-229; *Ward v. C. & N. W. Ry. Co.*, 61 Ill. App. 530-534; *Chicago City Ry. Co. v. Canevin*, — Ill. App. —.

The judgment of the Circuit Court is reversed without remanding.

Iroquois Furnace Company, Garnishee, v. Wilkin Manufacturing Company, for use, etc.

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181	582
77	59
101	5878

1. **GARNISHMENT**—*What the Garnishee May Contest*.—A garnishee may be heard to contest the findings and judgment against the original creditor only in case the court entering the judgment did not have jurisdiction of the parties and the subject-matter.

2. **SAME**—*When a Judgment Will Bar Proceedings by Original Claimant Against Garnishee*.—The judgment of a court not having such jurisdiction will not be a bar to proceedings by the original claimant against the garnishee. If, however, the court below had such jurisdiction then the garnishee can not be heard to contest the correctness of such judgment.

3. **CORPORATIONS**—*Residence of, etc.—Application of the Attachment Act*.—A corporation can not have a residence, in the ordinary sense of the term, but if it be a foreign corporation the attachment act applies to it the same as to a non-resident natural person. Whether it be a foreign corporation must be determined by the place of its organization.

4. **SAME**—*In Proceedings by Attachment—Affidavit*.—In proceedings against a corporation by attachment it is not sufficient to state in the affidavit that the defendant is not a resident of this State, and this defect is not cured by adding, in the affidavit, that defendant's "place of residence" is Milwaukee, in the State of Wisconsin.

Attachment and Garnishee Proceedings.—Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in the Branch Appellate Court of the First District at the March term, 1898. Affirmed. Opinion filed May 31, 1898.

STATEMENT.

The inception of this litigation was a suit in attachment by Pickards, Brown & Co. v. Wilkin Manufacturing Co. The attachment affidavit stated that the defendant "is not a resident of this State, and that its place of residence is at Milwaukee, in the State of Wisconsin." The appellant was served as a garnishee in that proceeding September 1, 1891.

October 20, 1891, John Barth filed his interpleader, simply claiming that the money due from appellant to appellee belonged to him. To this interpleader the plaintiff below demurred. June 13, 1893, said Barth, by leave of court, filed his amended interpleader stating that the appellee "was a corporation organized and doing business under the laws of the State of Wisconsin;" that, being insolvent, the defendant, in pursuance of the statute of Wisconsin, executed and delivered to said interpleader a voluntary assignment of all its choses in action and assets of every kind, which was accepted by said Barth prior to the commencement of said attachment suit; that the fund in the hands of said garnishee was the property of said Barth; and that under the laws of Wisconsin he was authorized to sue for and recover the same.

December 12, 1891, John Featherstone's Sons, a corporation, filed its interpleader claiming the funds due from appellant to appellee, by virtue of an assignment thereof made June 9, 1891, by said appellee.

October 22, 1891, appellant filed its answer as garnishee, stating that it had no property or assets in its charge belonging to said appellee; that it was not indebted to said appellee; that it had purchased of appellee two certain engines guaranteed by it to be of a certain quality capable of performing certain service; that such engines were not equal to the guaranty; that the garnishee could not at that time state the exact amount of its loss by reason of the failure of such guaranty; that it had been notified by John Featherstone's Sons that appellee had assigned its claims against appellant to said Featherstone's Sons; that certain mechanics' liens and attachment suits had been commenced;

and that said Barth, a resident of Wisconsin, claims by virtue of an assignment from appellee the indebtedness, if any, owing by appellant to appellee, and asks that said Barth may be made a party to this proceeding.

October 29th, default of appellee was ordered in the attachment proceeding and judgment entered. The appellee was not personally served with process, but by publication of notice, as against a non-resident.

Issues were duly made up as between the plaintiffs, the garnishee and the interpleaders, and on the 11th day of November, 1896, by agreement of parties, the cause was submitted to the court for trial without a jury. The findings and judgment of the court are that appellee recover from appellant the sum of \$12,250, for the use of the plaintiff in said attachment suit and of said interpleaders.

DEFREES, BRACE & RITTER, attorneys for appellant.

BARNUM, HUMPHREY & BARNUM; KNIGHT & BROWN; WINKLER, FLANDERS, SMITH, BOTTUM & VILAS; CRATTY BROS., JARVIS & CLEVELAND, attorneys for appellee.

MR. JUSTICE HORTON, after making the foregoing statement, delivered the opinion of the court.

The appellant is a party to this proceeding only as garnishee. It may be heard to contest the finding and judgment against the appellee only in case the court entering the judgment did not have jurisdiction of the parties and the subject-matter. The reason for this rule is that the judgment of a court not having such jurisdiction would not be a bar to proceedings by the original claimant against the garnishee. If, however, the court below had such jurisdiction, then the garnishee can not be heard to contest the correctness of said judgment. The reason for the rule not being present, the rule has no application.

The only ground upon which the attachment writ was issued is that appellee (defendant below) was a non-resident. The language of the affidavit is that the defendant

"is not a resident of this State, and that its place of residence is at Milwaukee, in the State of Wisconsin." There is no statement either in the affidavit or declaration as to whether the defendant is a corporation. It appears by subsequent pleadings that it is. It can not have a "residence," in the ordinary sense of the term, but if it be a foreign corporation, the attachment act applies to it the same as to a non-resident natural person. Whether it be a foreign corporation must be determined by the place of its organization. That is not stated in the affidavit. It is not sufficient, when referring to a corporation, to state in the affidavit that the defendant "is not a resident of this State." This defect is not cured by adding in the affidavit that defendant's "place of residence is Milwaukee, in the State of Wisconsin." The affidavit of itself, and standing alone, is not sufficient to sustain the jurisdiction.

This suit was commenced August 28, 1891. The notice was that defendant appear "on or before the first day of the next term thereof, * * * on the third Monday of August, 1891." The date named for the defendant to appear had already passed. That does not, however, make this notice void or the proceedings based upon it voidable. The defendant is notified to appear "the first day of the next term" of the court. The words "on the third Monday of August, 1891," may be treated as surplusage and the notice is then sufficient. *Rogers v. Miller*, 4 Scam. 333.

The defect in the affidavit as to the "residence" of the defendant is cured by subsequent pleadings and proceedings. The interpleading by Barth is in legal effect an appearance by the defendant. The issues presented by his interpleader were heard by the trial court, and there is no claim by assignment of error or in brief or argument that the averments thereof were not sustained by the testimony. We must therefore assume that the appellee voluntarily assigned all its title to and interest in the money due from appellant to it to said Barth, and that said Barth had full power and authority to appear for and in the name of appellee. That is a waiver of any defect in the affidavit or attachment proceeding so far as the question of jurisdiction is involved.

But it appears by the interpleader filed by said Barth "that the defendant company is a corporation organized under the laws of Wisconsin." This may also be held to be sufficient to cure the defect in the affidavit as to residence and to sustain the jurisdiction of the Circuit Court. *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404; *Muller v. Daws*, 94 U. S. 445.

The trial court had jurisdiction and its judgment is a bar to any other or further proceeding by the appellee or its assignee against appellant for the claim herein litigated. It can not, therefore, be heard to contest the correctness or validity of the judgment as against the appellee.

The claim against appellant, upon which judgment was entered, grew out of a contract between appellee and appellant for the manufacture and sale by appellee to appellant of two blowing engines. The contract is in form a letter by appellee to appellant, with specifications, and a letter of acceptance by appellant. In these letters the plural pronoun "we" is used for the corporate names. In the proposal which was accepted by appellant, appellee says:

"We propose to furnish you two blowing engines complete, as per specifications enclosed, for \$28,000, F. O. B. cars at So. Chicago."

"We send a man to superintend the erection and start the engines; we to pay his time and you his traveling expenses and board. The first engine to be delivered six months from date of order, the second, one month after the first one. We guarantee all of these to be of the best material and workmanship, and to be equal or superior to any blowing engine on the market."

The principal controversy as to this contract is as to the construction to be given to the guaranty in the last sentence above quoted. As stated in the appellant's brief, the theory of the appellant as to the construction of the contract in this regard is set out in the 2d, 3d, 4th, 5th and 8th propositions of law submitted to and refused by the court, which are as follows:

"2. The court holds that the true construction of said

contract is that the engines to be furnished by the Wilkin Manufacturing Company to the Iroquois Furnace Company should not only be constructed in accordance with the specifications, but that same, when so constructed, should be equal or superior to any blowing engine on the market."

"3. The court holds that the words 'to be equal or superior to any blowing engine on the market,' contained in said proposition, are equivalent to an undertaking or agreement on the part of said Wilkin Manufacturing Company that the engines should be constructed in such manner as to make them equal or superior in workmanship; and upon such plan as to make them as efficient in service as any blowing engine on the market."

"4. The court holds that the words 'any blowing engine on the market,' contained in said proposition, mean any kind or pattern of blowing engine which any known and established manufacturer of such wares was accustomed to manufacture and sell in the markets of the world at the date of said proposition."

"5. The court holds that the words 'any blowing engine on the market,' contained in said proposition, mean any kind or pattern of blowing engine which any known and established manufacturer of such wares was accustomed to manufacture and sell in the market of the United States at the date of said proposition."

"8. The court holds that the Wilkin Manufacturing Company, by its contract aforesaid, undertook and agreed to construct the engines therein mentioned in such manner and upon such plan that they would be, as a whole, as good, durable, efficient and serviceable as any blowing engine which other manufacturers of such wares were accustomed to manufacture and sell."

There were several rulings by the court as to the admission of testimony which present the same question. The contract is dated July 2, 1890. The trial was in November, 1896. Said 2d, 3d, and 8th propositions omit to name any time. The court was asked thereby to hold that the two engines in question contracted for in July, 1890, "should be

equal or superior to any blowing engine on the market" between six and seven years thereafter. This must have been intended, because said 4th and 5th propositions are limited to "the date" of said contract.

But said propositions are fatally at fault in that they entirely disregard the specifications which form a part of the contract. The contention of appellant is, in effect, that the specifications are mere surplusage; that the duties and obligations resting upon appellee are the same under its guaranty that the engines in question should "be equal or superior to any blowing engine on the market," as they would be if there were no details and specifications in said contract.

The trial court made these statements to appellant's attorneys at the time of the trial, viz.:

"If you can show that any other engine of precisely the same specifications, or substantially the specifications named here, was on the market at the time, I will allow you to compare this engine, but it must not differ in the specifications in any material particular.

"I will state to you now that if you can find any engine that was on the market, then constructed, on the same specifications that these engines were constructed on, viz.: the specifications written and attached to this contract, I will allow you to compare these engines."

Said propositions may also have been refused for the reason that they entirely ignore the fact that blowing engines may be constructed much larger than those described in the specifications. The guaranty clause, when construed in connection with the balance of the contract, as it must be, means that the engines are "to be equal or superior to any blowing engine on the market" of the size, dimensions, etc., detailed in the specifications. Suppose that there was an engine on the market with a blowing cylinder twice the diameter and with twice the stroke of that described in this contract, and with steam cylinder, valve area, and all other parts in proportion. The cost and capacity of such an engine would be very much more than that of one of the

engines described in this contract. Appellee did not guarantee that one of the engines in question should be equal to such an engine. Nor did appellee guarantee that the engines in question should be equal to any that might be constructed anywhere in the world within the next six years after making its contract. The trial court marked said propositions "refused," and in so doing committed no error.

A supplemental contract was entered into by these parties, extending the time for the delivery of said engines, and providing that if not delivered at the times fixed by such extension, appellee should pay to appellant "as liquidated damages for any delay * * * the sum of fifty dollars per day." The engines were not delivered at the time fixed. Appellant contends that it should be allowed the fixed sum of fifty dollars per day as damages. Appellee contends that the sum named is in the nature of a penalty, and that appellant should be allowed such damages only as the proof shows it to have actually suffered.

The books abound in cases upon this much mooted question, and it has been exhaustively argued by counsel in this case. We do not, however, deem it necessary to enter at length into a discussion of it here. The court below held correctly that, under this contract and the circumstances of this case, the provision was in the nature of a penalty and not liquidated damages.

Perceiving no material error, the judgment of the Circuit Court is affirmed.

Chicago & Grand Trunk Railway Co. v. Homer M. Stewart.

77	66
99	*525
77	66
112	*142

1. *QUESTIONS OF FACT—Province of the Jury.*—Where questions of fact are presented to the jury, if they are clearly and properly instructed, and no material errors occur in the rulings of the court upon the trial, the verdict, if uninfluenced by passion or prejudice, should not be disturbed, even though this court, if sitting as jurors, might have reached a different conclusion.

C. & G. T. Ry. Co. v. Stewart.

2. **RAILROAD COMPANIES—Care of Station Arrangements.**—The degree of care required of railway carriers, in respect to its station arrangements, is not so great as in respect to its tracks and running machinery; in such cases the carrier is bound simply to exercise ordinary care in view of the dangers to be apprehended.

3. **SAME—Who are Passengers.**—So long as a person who merely proposes to be carried is at liberty to change his mind, he is not a passenger, and for an injury which he may sustain through the negligence of the carrier, he must seek redress as a stranger.

4. **NEGLIGENCE—Attempting to Get upon a Moving Train.**—Attempting to get upon a moving train may be negligence which prevents the person injured in so doing from recovering for any accident that may happen in consequence thereof.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County: the Hon. PHILIP STEIN, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in the Branch Appellate Court of the First District, at the March term, 1898. Reversed and remanded. Opinion filed May 31, 1898.

STATEMENT.

This is an action to recover for personal injuries received by appellee the forenoon of March 4, 1892. The accident occurred at Mt. Olivet station upon the defendant's road, where appellee had gone to attend a funeral. Returning to the station from the cemetery, appellee was struck by a train approaching from the south, due to leave Mt. Olivet station at 2:40 P. M. His version of the accident is that he was walking upon the grounds of appellant toward the station, in company with others, upon loose planks laid parallel with the tracks, when the unexpected approach of the train caused a man behind him on the south end of the same plank to jump away from the track, and in doing so give the plank a movement which, it is claimed, "slewed" it from under appellee's feet, throwing him against the moving train. He claims to have been struck on the jaw with such force as to jerk his legs upon the rail in front of the rear truck of the passing car, which ran over his right leg necessitating its amputation below the knee. The planks in question are alleged by appellee to have been from twelve to fourteen feet long, and to have extended from the street

to the depot, three layers in width, and to have been laid loosely in the mud. Appellee says he was about thirty feet from the depot, walking upon the plank nearest the rail, and about two feet from it. He says he was unaware of the approach of the train, which was in plain view from a long distance, and advancing at a rapid rate, until some one called "Look out!" and was then immediately thrown against it in the manner stated.

Appellant's testimony is to the effect that there were no such planks there, and that appellee received his injuries in an effort to get on to one of the cars of the moving train.

SAMUEL A. LYNDE, attorney for appellant.

MASTERSON, FOWLER & HAFT, attorneys for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

There is such a radical conflict of testimony in this case that no good purpose can be subserved by its discussion. The questions of fact were presented to the jury, and if the latter were clearly and properly instructed, and no material errors occurred in the rulings of the Superior Court upon the trial, the verdict of the jury, if uninfluenced by passion or prejudice, should not be disturbed, even though if sitting as jurors, we might have reached a different conclusion.

It is urged by appellee that the Superior Court erred in refusing to permit the company's counsel to recall two of appellant's witnesses after the latter's counsel had rested their case, but before any witness had been called for the defense. The questions proposed to be put to these witnesses were no doubt proper in themselves, but the court refused to allow them to be put, on the ground that it was too late. If this was an abuse of the discretion of the trial court, the objection is one that will not arise upon another trial, and can be obviated by putting the questions at the proper time.

It is insisted that there was error in the second and fourth instructions given on behalf of appellant.

The first of these instructions told the jury that it was the duty of the railroad company to maintain its depot grounds and approaches "in a reasonably safe condition and free from obstructions which would render the grounds dangerous or unsafe." It is said that this was erroneous in this case, inasmuch as the railroad company is only required to exercise ordinary care to so maintain them. In *Hutchinson on Carriers*, 521a, it is said that "the degree of care required of railway carriers in respect of its station arrangements, is not so great as in respect of its tracks and running machinery. * * * The rule in such cases is that the carrier is bound simply to exercise ordinary care in view of the dangers to be apprehended." It is no doubt true that if, with a full knowledge of the facts, the railway company permits an unsafe and dangerous means of getting to and from the station to be used, it is liable for an injury arising therefrom, whether it provided or constructed the dangerous way itself or not. *Idem.*, Sec. 519. But in the accessories to its business, such as stations or depots and approaches thereto, the obligation of the company is to use ordinary care except where the relation of passenger and carrier exists. *T. W. & W. R. W. Co. v. Grush*, 67 Ill. 262, 264; *Tucker v. Champaign Co. Agricultural Board*, 52 Ill. App. 316-321; *I. C. R. R. Co. v. Hobbs*, 58 Ill. App. 130.

In the last of the cases cited (*I. C. R. R. Co. v. Hobbs*) it is said: "The care required as to the platform was ordinary and not extraordinary."

The possession of a round-trip ticket, regularly purchased, would not create the relation of passenger and carrier with reference to the train by which the injury was inflicted. It was so held in *Spannagle v. C. & A. R. R. Co.*, 31 Ill. App. 460, a case where the facts were, in some respects, similar to the theory of the defense in this case. The relation of carrier and passenger had not been established at the time of this accident, under the evidence introduced to sustain either theory of the facts. It is said in *Hutchinson on Carriers*, Sec. 562, that "so long as the

person who merely proposes to be carried is at perfect liberty to change his mind, he is not a passenger, and for any injury which he may sustain through the negligence of the carrier, he must seek redress as a stranger."

In *Moreland v. Boston & Prov. R. R. Co.*, 141 Mass. 31, it is held that "the degree of care is not fixed solely by the relation of carriers and passengers; it is measured by the consequences which may follow the want of care. A railroad company is held to the highest degree of care in respect to the condition and management of its engines and cars, because negligence in that respect involves extreme peril to passengers, against which they can not protect themselves. It would not act reasonably if it did not exercise greater care in equipping and running its trains, than in regard to the condition of its station grounds." In that case the passenger was injured while passing from a train by slipping on some loose shingles left on the ground by the defendant company when shingling its station house.

In *Kelly v. Manhattan R. Co.*, 112 N. Y. 443, a passenger was injured in descending the stairway from the station. The court, after stating that the rule required from the railroad company in its capacity as carrier of passengers, the exercise of the utmost care, so far as human skill and foresight may go, says: "But in the approaches to the cars, such as platforms, halls, stairways and the like, a less degree of care is required, and for the reason that the consequences of a neglect of the highest skill and care which human foresight can attain are naturally of a much less serious nature. The rule in such cases is that the carrier is bound simply to exercise ordinary care in view of the dangers to be apprehended."

In view of the controversy over the facts in relation to how the accident occurred, we regard it as erroneous to tell the jury, in effect, that it was the absolute duty of the railroad company to maintain its depot grounds and approaches in such a condition as to be free from obstructions, which would, under any circumstances, be dangerous and unsafe. There was no evidence of any obstructions there. These

planks were in no sense obstructions according to the evidence. The necessary movement of trains, the handling of baggage or freight, and the movements of passengers themselves, may at times create temporary conditions of danger at certain places to persons not themselves exercising proper care. If the railroad company has used ordinary care in view of the dangers to be apprehended, it would not be liable. The objection to the two instructions complained of, is, we think, in this case, well founded.

The counsel for appellant requested the court to instruct the jury, that if they believed from the evidence that the appellee was endeavoring to get upon the moving train at the time, and was injured in consequence of such attempt, he was guilty of negligence and could not recover; that it is negligence for a person who is intending to become a passenger, to attempt to get on a railroad train impelled by steam while it is in motion.

Our Supreme Court has held in a number of cases, that to get off a moving train is negligence, and has likewise held that the same principle should be applied to one injured in getting on a moving train. *C., R. I. & P. Ry. Co. v. Eininger*, 114 Ill. 84; *Cicero St. Ry. Co. v. Meixner*, 160 Ill. 320, 324 and cases there cited.

There was evidence introduced in support of appellant's contention, that appellee received his injury by attempting to get on the train before it stopped at the station. The court refused to give these instructions, but did attach a proviso to the second and fourth instructions above referred to, which were given on behalf of the appellee. After stating the duty of the company to be, to maintain its depot grounds in a reasonably safe condition and free from obstructions, which would render them dangerous or unsafe, the instruction concluded as follows: "Provided you do not believe from the evidence that he was attempting to get on the moving train, if it was moving, and thereby received his injury."

Inasmuch as this involved an actual and vital issue in the case, it was important that the jury should be clearly and

unambiguously instructed thereon. The proviso was, no doubt, a proper modification to be added to the two instructions given for appellee. But it may well be doubted whether, when given in that form, it so distinctly called the jury's attention to the principle of law applicable as to justify the refusal of its direct statement. It certainly did not instruct them that the attempt to get on the moving train, if made, was negligence, and that if the injury was thereby caused, the appellee was not entitled to recover. It is a commendable practice for the trial court to abbreviate and condense, so far as possible, the often too numerous instructions presented by overzealous counsel, and among which substantial duplicates are frequently found. But in this case, we are of opinion that the appellant was entitled to have the jury instructed upon the law applicable to its theory, as to the way in which the injury was caused.

Appellant was entitled to have the law, bearing upon the question as to contributory negligence, clearly presented to the jury, and claims that this was not done. The objection will no doubt be obviated upon another trial, and we do not deem it necessary to extend this opinion by re-stating well-known principles.

The judgment is reversed and the cause remanded.

John Stirlen v. Amos Pettibone et al.

1. *AMENDMENTS—To Oral Pleadings.*—The court knows of no way to amend an oral pleading except it be done orally, which was done in this case.

Assumpsit, on a contract of guaranty. Trial in the Circuit Court of Cook County on appeal from a justice of the peace. The Hon. RICHARD W. CLIFFORD, Judge, presiding; verdict and judgment for plaintiff; appeal by defendant. Heard in the Branch Appellate Court of the First District, at the October term, 1897. Affirmed. Opinion filed May 31, 1898.

SAMUEL B. KING, attorney for appellant.

WARVELLE & CLITHERO, attorneys for appellees.

MR. PRESIDING JUSTICE SHEPARD delivered the opinion of the court.

This cause originated before a justice of the peace, and hence, without pleadings. It was begun against appellant and the Travelers League Publishing Company, a corporation, and from a judgment against both defendants, before the justice, an appeal was taken by them to the Circuit Court. There, for the purpose of avoiding a possible continuance asked by the present appellant upon a point connected with the jurisdiction of that court over the defendant corporation, leave was asked by the appellees, and given, to dismiss the suit as to the corporation. Thereupon, over the motion of appellant for a continuance, because a trial as to him alone presented a different issue from that upon which he was prepared, the cause proceeded to trial and resulted in the judgment against appellant alone, now appealed from.

It is contended that it is error to render judgment against one joint defendant without disposing of the cause as to the others, which we concede; and it is said that because a leave to amend does not perform the office of an amendment itself, the defendant corporation remained still a party to the suit at the time judgment was rendered against appellant, and has so remained hitherto.

The fallacy of the argument is found in the fact that there were never any written pleadings in the cause. Oral pleadings are incapable of amendment by a writing in the form of an amendment. We know of no way to amend an oral pleading except it be done orally, which was what was done in this case. The record shows that "thereupon * * * plaintiffs moved to dismiss their suit as to the Travelers League Publishing Company, which motion the court thereupon granted," and thereafter it was that appellant further moved, as before mentioned, for a continuance upon the ground that, as the record shows, the defendant (appellant) came into court prepared to try the cause upon the

issue made by the denial of joint liability with the Travelers League Publishing Company, * * * and that the dismissal of the Travelers League Publishing Company as co-defendant wholly changed the issues, and that he was wholly unprepared to meet the issues presented by the election of plaintiffs to hold him singly."

The cases appellant relies upon are ones in which there were written pleadings.

We hold that the amendment was properly made, and that by it, the cause was disposed of as to appellant's former co-defendant. There was no error, therefore, in respect of the judgment being rendered against appellant alone, and there being no other error argued, this substantially disposes of the case.

Appellant's counsel have only this to say about the other errors that are assigned: "Several other errors are assigned which we believe to be supported by the record, the mere statement of which, in the assignment of errors, points out the reasons upon which they are based."

Even if we should accept the division of work the appellant has invited us to in this manner, we should have to affirm the judgment for the reason that the bill of exceptions does not purport to contain all the evidence. An examination, however, of so much of the evidence as is before us discloses no merit in appellant's defense. The judgment, therefore, is affirmed.

Allen C. Story v. William W. De Armond.

1. **REFEREE—Objection to His Report.**—Where the parties to a suit appoint a referee by agreement, each knowing the relations of the other to him before and at the time of his appointment, neither can be heard to urge such previous relation as a ground of objection to his report.

2. **SAME—Objections to be Waived, Partiality, etc.**—If parties in controversy choose to waive the rights of impartial trial, and purposely select as a referee a person who has formed opinions on the subject-matter of the controversy, or known to have partialities for or against the

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respective parties, the court, without commending, will not set aside his report merely because of the character of the referee.

3. *SAME—When the Report Can Not be Impeached.*—If a party, knowing of the alleged disqualification of a referee, proceeds with the hearing, and omits to object until after the report is made, he can not have the report impeached for such disqualification.

4. *SAME—Proceeding Without Being Sworn—Waiver.*—Where the law requires that a referee should be sworn, the omission to comply with such requirement will be considered as waived by the party proceeding without objection.

5. *SAME—Presumptions as to Qualification.*—Where the law requires a referee to be sworn, the presumption is, in the absence of evidence to the contrary, that he was sworn.

6. *SAME—Judges of the Credibility of Witnesses.*—Referees, while performing the functions of a jury, are the judges of the credibility of the witnesses and the weight of the evidence, and their findings and conclusions of fact are entitled to the same considerations as the verdict of the jury.

Assumpsit, for clerk's services. Trial in the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Judgment for plaintiff on referee's report. Appeal by defendant. Heard in this court at the March term, 1898. Affirmed. Opinion filed May 26, 1898.

STORY, RUSSELL & STORY, attorneys for appellant.

WM. W. DE ARMOND, attorney for appellee; JOHN P. ARENS, of counsel.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment rendered in an action of assumpsit by appellee against appellant for clerkly services alleged to have been performed by the former for the latter. The declaration contains a special count averring a contract to pay appellee for his services \$75 per month, and the common *quantum meruit* count. The appellant pleaded non-assumpsit only, and the court, by agreement of the parties, appointed George F. Westover sole referee and the cause was referred to him. The referee made a very full and clear report of his findings, which is insufficiently abstracted, but which appellee's counsel has, to the great convenience of the court, set forth in his printed argument.

The following brief synopsis of the referee's report is contained in the abstract:

"Plaintiff entered employment July 31, 1885, at a salary of \$75 a month, and continued at that salary until discharged November 16, 1894. That the plaintiff received the total sum of \$5,549.97, and is chargeable with \$81.53 interest on certain money which he held belonging to one of defendant's clients, leaving balance of \$2,731, amount due, including interest to date of report, \$3,022.64, and recommends judgment for said amount."

The court, on exceptions filed by appellant, disallowed the interest and entered judgment for \$2,731.

Appellant filed twenty exceptions to the report, all of which, except exception 14, objecting to the allowance of interest, were overruled. Exception 10 is as follows:

"10. That the referee at the time of the reference and hitherto, and the plaintiff, maintained confidential relations, and the plaintiff has been a clerk of said referee during the whole period of said reference, and the said referee has been and remained strongly prejudiced against defendant, which facts were wholly unknown to defendant at the time," etc.

Five affidavits were read by appellant in support of his exceptions, and Mr. Westover, the referee, was called and testified orally on behalf of the plaintiff in opposition to exception 10.

The evidence *pro* and *con* is too lengthy to be recited, even in substance, in this opinion. We have carefully read and considered the affidavits read on behalf of appellant as they appear in the abstract, and also the testimony of the referee in the record, and are of opinion that the court ruled correctly in overruling exception 10, above quoted. The exception contains two charges: First, that at the time of the reference and hitherto, the plaintiff maintained confidential relations with, and has been a clerk of the referee during the whole period of the reference. Second, that the referee has been and remained strongly prejudiced against appellant, which facts were wholly unknown to appellant at the time, etc.

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The appellant, in his affidavit, says: "After the report was made, deponent accidentally learned for the first time that plaintiff had been in Westover's employ and had attended to business for him during the entire year." This is hearsay. Appellant does not state, as of his own knowledge, that appellee had been in the referee's employ. He says he so learned. Westover, the referee, testified that he did not remember of appellee having ever been in his employ; that he certainly had not been since his discharge by Mr. Story (which the evidence shows was November 16, 1894, more than six months before the suit was commenced); that he may have sometimes asked De Armond, when he was going to court for Story, to answer to some case on general call, or something of that kind, as a courtesy, never anything more. Referred to in the affidavit of Mr. Story and attached thereto is a card, of which the following is a copy:

"TO THE CHICAGO LAW INSTITUTE:

I hereby certify that W. W. De Armond, Esq., the bearer, is an assistant in my office; that he is not practicing law except as employed by me; that he is a suitable person to have access to the rooms of the institute; that he is authorized, until further notice, to receipt for books in my name, for my exclusive use; and that I will pay any fine or damages which may arise through him to the said institute.

GEORGE F. WESTOVER.

I hereby agree to use the library for Geo. F. Westover and myself exclusively, and in no case draw any of the books in the library, except at the request and for the personal use of the said Geo. F. Westover.

W. W. DE ARMOND.

Chicago, Jan. 13, 1896."

This is printed, with the exception of the names, the word "assistant," the date "Jan. 13," and the figure "6," showing that it is a form used by the Law Institute for the withdrawal of books by non-members of the institute on the certificate of members. Mr. Westover testifies on cross-examination, that he probably signed such a card (the

original was not produced on the hearing), but that he knew nothing of the contents of it, and never did; that he recollected that De Armond had some cases which he had turned over to him long before, and that after he left the office, he consulted with him about questions of law arising in the cases, and that very likely he signed the card in connection with those cases.

While it is doubtless true that the signing of the card in question was not strictly in accordance with the rules of the Law Institute, we do not think the circumstance sufficient to overcome Westover's sworn statement that appellee was never in his employ.

The referee, in his testimony, denies that he was at all prejudiced against or entertained any ill-feeling toward appellant, and denies all knowledge of any estrangement between them.

We can not discover in the proceedings before the referee any evidence of unfairness, partiality or prejudice on his part. On the contrary, the proceedings seem to have been conducted, in so far as he was concerned, with the utmost fairness and impartiality.

The evidence is that both appellant and appellee had long been acquainted with Mr. Westover; that before the reference, each of them applied to him to procure, if possible, a settlement of the case; that they both expressed a willingness to leave the matter to him; that he declined to act as arbitrator between them, giving as a reason that an arbitrator's decision, if wrong, could not be corrected on review, but consented to act as referee, because, on review, errors, if any, could be corrected. The parties had been in the same office with Mr. Westover for four or five years, the appellee during that time being appellant's clerk, and the referee a *quasi* partner of Mr. Story under the firm name of Story, Westover & Story. Thus, each of the parties had ample opportunity to know the relation which existed between the referee and the other, and with such knowledge, each, doubtless, having confidence in the ability and integrity of Mr. Westover, chose him as referee. But even though each

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so chose him from a less honorable motive, namely, because he supposed or hoped he would be more friendly to him, this would not change the aspect of the matter. Each having known the relations of the other to the referee before and at the time of consent to the reference, neither can now be heard to urge such previous relation as a ground of objection to the report.

In *Van Blaricum v. The People*, 16 Ill. 364, a juror who had formed and expressed an opinion was accepted on the panel without objection, and this was assigned as error, but the court overruled the assignment, saying: "If the parties chose to have their cause tried by a prejudiced juror, it was not for the court to refuse them the right." The same is true in the case of an arbitrator. Morse, after stating matters which would disqualify an arbitrator, among them prejudice against one of the parties, says:

"But the parties may, if they choose, waive the objection which might exist on any of the preceding grounds. They are at liberty to select a person interested, or a person prejudiced, a relation, or an enemy of either of them. Judge Cushing said, in *Strong v. Strong*, 9 Cush. 560: "If indeed parties in controversy choose to waive the rights of impartial trial, and purposely and avowedly select as arbitrators persons having formed opinions on the subject-matter, or known to have partialities for and against the respective parties, the court, without commending, will not set aside the award merely because of the character of the arbitrators." And Chief Justice Shaw said, in *Fox v. Hazelton*, 10 Pick. 275: "*Volenti non fit injuria*. If parties are content to submit questions in controversy to those who are known to have formed and expressed opinions upon the subject-matter, or who are known to have partialities or prejudices for or against the respective parties, an award made by such arbitrators is binding." As it often happens, each party selects some one in whose favorable opinion he reposes confidence, and it is trusted that the opposite prejudices will balance each other. Awards made by such referees can not be impeached."

The rule is the same if a party, knowing of the alleged disqualification, proceeds with the hearing without objection, and omits to object until after the report is made.

While the affidavits charge prejudice generally, there is nothing in appellant's or any of the affidavits showing when the prejudice, if any, came to appellant's knowledge.

Morse recognizes that there is a distinction between such a reference as the one under discussion and a submission to arbitration, and says: "Indeed, the language of the courts in rendering their adjudications has nearly always been so lax, that the distinctions properly existing between the various descriptions of reference and submission have become hopelessly confused." *Morse on Arbitration and Award*, 49. On a submission to arbitration under the statute, the arbitrators are judges, and their award is final, and the court can not review it on the merits. It is beyond the province of the court to pass on the merits of the controversy. On the other hand, the province of a referee is substantially the same as that of a master in chancery; the reference to him is to report the evidence to the court with his conclusions of law and fact, (Stats. E. 117, Sec. 1,) and his conclusions are not final, because the court, on exceptions being taken to the report, can hear and determine the entire controversy on the merits, and the judgment, when pronounced, is the judgment of the court and not of the referee.

It is objected that permitting the referee to testify orally on the hearing of exceptions to his report was error. This question is not argued, appellant's counsel merely citing the following cases, none of which is in point:

In *Ward v. Gould*, 5 Pick. 291, affidavits of the arbitrators giving a meaning to their report which the words used did not convey, were read. The court held that it could not, for the purpose of construing the report, consider the affidavits.

In *Newland v. Douglas*, 2 Johns. 62, the testimony of arbitrators was offered to prove a mistake in their award, in other words, to impeach the award. The testimony was held inadmissible.

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In *Pullman v. Pensoneau*, 33 Ill. 375, the court say: "As a general rule arbitrators will not be permitted to give evidence to impeach their award."

In *Stone v. Atwood et al.*, 28 Ill. 30, 43, a bill was filed to have an award corrected on account of an alleged mistake, and testimony tending to prove the mistake having been introduced by the complainant, one of the arbitrators was called and testified on behalf of the defendant. This was assigned as error. The court say: "Like a juror, he can not be called to impeach his award, but like him, he can be called to sustain it. That was the purpose and office of the testimony of the arbitrator called by Atwood."

"In proceedings under a bill in equity, seeking specific performance of an award concerning the dissolution of a partnership, the arbitrators were permitted to testify concerning what matters were presented before them, and even whether or not they had decided all the matter referred." *Morse on Arb. and Award*, 361, citing *Hawksworth v. Brammall*, 5 Ill. & Cr. 281.

In *Robinson v. Shanks et al.*, 118 Ind. 125, cited by appellant's counsel, a motion was made to set aside an award on the ground that one of the parties had, pending the arbitration, counseled and advised the arbitrators, induced one of them to go to his house, remain there all night and partake of his hospitality, and also induced two of them to go with him to the hotel and dine at his expense. Affidavits were filed in support of the motion, and on the hearing of the motion the court permitted the arbitrators to be examined as witnesses in open court. The referee was not examined with reference to the ground of his conclusions, or as to any matter which had been before him as referee, but merely in reference to the charges of prejudice and partiality made against him by appellant, and we are of opinion that his testimony was properly admitted.

It is objected that the referee was not sworn. As to whether he was or not, the record is silent. The proceeding by reference is strictly statutory, and the statute, chapter 117, does not require that the referee shall be sworn.

In support of this contention, appellant relies on chapter 10 of the statute in relation to arbitrators, which requires that arbitrators shall be sworn, but the statute in relation to arbitrators does not, in any respect, govern the proceeding under chapter 117 in respect to referees. Counsel for appellant contend that either chapter 117, in force July 1, 1872, is repealed by chapter 10, in force July 1, 1873, or if not, the statute must be construed together as being in *pari materia*, and that so construing them, the reference to a single referee was unauthorized, inasmuch as chapter 10 provides for a reference to three arbitrators. We think it sufficiently apparent, from a mere inspection of the two statutes, that they provide for distinct and independent proceedings, that there is no repugnancy between them, and that the proceedings under each statute must be considered solely with reference to the statute under which they purport to be. In *Morey v. Warrior Mower Co.*, 90 Ill. 307, the court recognizes both statutes as being in force, as they undoubtedly are. Even if the law required that the referee should be sworn, the omission to comply with such requirement would have to be considered waived by appellant. The record shows that he was present the first time appointed for taking testimony before the referee, that there was an adjournment till another time by his request, and that he authorized the referee to proceed in his absence, if he should not appear at the time to which the adjournment was had; also, that appellant appeared by attorney, from time to time, before the referee, and cross-examined and examined witnesses, in addition to which it does not appear when appellant first learned that the referee was not sworn, if such is the fact. See *Pardridge v. Ryan*, 134 Ill. 247, 254.

If the law required the referee to be sworn, the presumption would be, in the absence of evidence to the contrary, that he was sworn (*Garrity v. Hamburger Co.*, 136 Ill. 499, 510), and there is no evidence on the record that he was not sworn.

It appears from the record that February 2, 1897, the court, on the motion of appellant, referred back to the

referee his report filed prior to that date, with directions to receive, hear and pass on such objections as might be presented to him by the parties, or either of them, within ten days from that date, and to make such corrections or amendments of his report as he might deem advisable. Appellant now objects to this order made on his own motion, and to the action of the referee, which was strictly in accordance with the order. To put the matter plainly, appellant requested the court that a certain thing should be done, the court acceded to his request, and the thing was done, and now he complains of it having been done. It is clear that he can not be heard to make such objection. Appellant contends that the referee's power was exhausted when he made his report, and the court was powerless to refer it back to him. By the very terms of section 1 of the statute the court has power to refer a cause back to the referee. Aside from the statute, we are of opinion that the power of the court to refer back was ample. "The appointment of a referee in a common law controversy stands upon the same reason as the reference to a master of a similar controversy in chancery, and the proceedings founded on a similar necessity should be similar." *Pardridge v. Ryan*, 35 Ill. App. 230, 242.

In *Cumberland v. North Yarmouth*, 4 Greenl. (Me.) 459, it was objected that the referee had no power to make a second report after recommitment. The recommitment was by order of the court. The court (*Ib.* 464) overruled the objection, saying, among other things: "Recommitments of reports made under a rule of court, or under a submission before a justice, in regard to which the Common Pleas has, by statute, the same power as it has over its own rules, have been uniformly made, both in this court and the Common Pleas, whenever, in the opinion of the court, the purposes of justice required such a course." Cases having been cited in support of the position that the referees having made their report, their power was exhausted, the court distinguished between the cases cited and the case then at bar, saying: "But all these were cases of submission to arbi-

trate out of court, in some of which they were expressly restricted as to time, and in others their power was held to be at an end after it had been once exercised."

Having thus disposed of the objections which, if sustained, would exclude consideration of the report, some, if not all of which have, perhaps, received more attention than they deserve, we will next consider the objections which go to the proceedings before the referee and to his conclusions. It is objected that the finding of the referee that there was a contract between the parties for the payment by appellant to appellee of \$75 per month, as compensation for the latter's services, is contrary to the evidence. This finding was based mainly on the testimony of appellee and Witherell, and two documents introduced in evidence by the appellee, marked Exhibit "B" and Exhibit "C," respectively.

The referee found that appellee's employment by appellant commenced July 31, 1885, and terminated November 16, 1894, and no fault seems to have been found with this finding.

April 1, 1886, one Bailey, William C. Witherell, and appellant, entered into a sort of partnership, by the terms of which the net profits of the business were to be divided between them in the proportion of three-fifths to appellant, one-fifth to Bailey and one-fifth to Witherell. The partnership was dissolved by the retirement of Bailey, January 20, 1887. Appellant, Witherell and Bailey met together for the purpose of ascertaining the net earnings, etc., of the partnership up to the date of dissolution, and the amount then due each partner. Appellee, being appellant's clerk, was present and assisted in the computations. Exhibit "B" consists of six sheets or leaves, on which are set down figures showing the gross earnings, the total expenses, including expenses paid and liabilities remaining unpaid, the profits, the share of the net profits of each partner, the state of the account of each partner, and the amount due him January 20, 1887. In the list of liabilities or expenses remaining unpaid, which list is in the handwriting of Mr. Bailey, is the following: "De Armond, \$620." The gross amount

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of earnings was first figured at \$7,761.57. The amount of liabilities unpaid, including the liability to De Armond of \$620, was set down by Mr. Bailey at \$812.29. This was deducted from the gross earnings, \$7,761.57, leaving the balance \$6,949.28, and from this last amount was deducted the expenses which had been paid, \$1,660.05, leaving net profits to be divided \$5,257.23. The last three amounts are set down on page 2 of the exhibit in Mr. Story's handwriting, showing that he adopted the figures, and the partners, appellant, Witherell and Bailey, settled on the basis of the net income ascertained as above stated. Appellee, cross-examined by appellant in person with regard to Exhibit "C," was questioned and answered as follows: Q. "In whose handwriting are the figures not included in the red or blue lines?" A. "They are in Mr. Story's handwriting." This evidence is not abstracted. Original Exhibit "B" has been certified to us in conformity with a rule of the court, and we have examined it, and find that the figures on page 2 of the exhibit "not included in the red or blue lines," are the figures finally agreed on and accepted as a basis of settlement, showing gross income, gross expense and net income. These figures are in six lines, and are alluded to in the printed argument of appellant's counsel as "six words," and are admitted to be in appellant's writing.

From the date when the partnership commenced, April 1, 1886, to the date of its dissolution, January 20, 1887, was nine and two-thirds months. Appellee testified that during that time he received only \$105. Add to this \$620, the admitted liability to him, and we have \$725, which, for nine and two-thirds months, is at the rate of \$75 per month.

From January 31, 1887, until February, 1890, the appellant and Mr. Witherell continued in business under an arrangement by which the latter was to receive a proportion of the profits of the business. Exhibit "B" is a statement of the account between them which was accepted by both as a basis of settlement. This statement contains certain items of credit in favor of Mr. Story, one of the items

being, "By due De Armond, \$1,260.77," and the referee finds from the evidence as to the sum paid appellee during the three years from January 31, 1887, till February 1, 1890, that the amount of such sums added to the \$1,260.77 remaining unpaid, showed appellee's compensation for the three years to have been in the aggregate (within some cents) equal to \$75 per month.

Appellant now objects to the introduction in evidence of Exhibits "B" and "C," alleging that they were not competent evidence, and in addition that there are certain erasures on Exhibit "B" which should have been explained. It may be observed that one would naturally expect to find erasures and figures crossed out on sheets used in figuring the condition of such a business as that of appellant and his partners, extending through nine months. Appellant personally cross-examined appellee before the referee in regard to both exhibits, and no objection was made to their introduction in evidence, nor was any explanation called for, nor any motion made to exclude them. It is very clearly shown by the report of the referee, that there is no erasure on Exhibit "B" which affects in any way the conclusion that the liability of \$620 to appellee was deducted from the gross income of the partners, and that it was charged by appellant against Bailey and Witherell and acceded to by them. Appellee testified that Story agreed to pay him \$75 per month. Appellant, however, denies that he so agreed.

William G. Witherell, formerly in business with appellant, was called as a witness by appellant, and testified on his direct examination: "Mr. De Armond has asked me and tried to have me recollect these things. I told Mr. De Armond I had an impression he was getting \$75 per month, but I don't know how I got it. I don't know how I heard it, but I thought he was getting \$75 per month there, and that Mr. Story also got him a position in a night school, and he was to make from \$12 to \$15 a week there." This witness also testified that, at the time he left, there was an item charged as due to Mr. De Armond, about \$1,200, so he

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thought that Story charged him with a certain amount for salary due De Armond, and he made no objection to it. This the witness testified from memory, thus corroborating Exhibit "C," in which the item is \$1,260.77.

"Referees, while performing the functions of a jury, are the judges of the credibility of the witnesses and the weight of the evidence, and their findings and conclusions of fact are entitled to the same consideration the verdict of a jury receives." *Butler v. Randall*, 25 Ill. App. 586, 590; opinion adopted by Supreme Court in *Butler v. Cornell, Adm'r, et al.*, 148 Ill. 276.

Such being the rule, the finding of the referee that appellant contracted with appellee to pay him \$75 per month, can not be set aside unless manifestly contrary to the weight of the evidence. We can not say that the finding either as to the contract, or the amount the appellee is entitled to recover, exclusive of interest, is against the weight of the evidence. It certainly is not manifestly so. Quite a number of witnesses testified that such services as the appellee performed for appellant were worth from \$75 to \$150 per month, and the referee, under the *quantum meruit* count, and without reference to the count on the contract, might well have found from the evidence that appellee was entitled to recover \$75 per month.

Other objections are urged, none of which we consider ground for reversal. A motion of appellee to strike from the abstract and from appellant's argument certain photographs, was reserved till the hearing. The photographs being in the abstract were doubtless intended by appellant as reproductions of certain documents introduced in evidence, copies of which are in the transcript of the record. Without passing on the question whether the photographs are or not correct representations, the motion will be overruled.

The judgment will be affirmed.

George B. Kerr v. H. R. Smiley, for use of Leonard Peterson and George B. Fisher, as Leonard Peterson & Co.

1. APPELLATE COURT PRACTICE—*Defective "Briefs and Arguments."*
—When the appellants do not point out or refer to the rulings of the trial court in admitting or excluding testimony, or in instructing the jury, which are claimed to be erroneous, the judgment appealed from will be affirmed.

Garnishment.—Trial in the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Verdict and judgment for garnishee. Appeal by garnishee. Heard in the Branch Appellate Court of the First District at the March term, 1898. Affirmed. Opinion filed July 16, 1898.

WICKETT & BRUCE, attorneys for appellant.

WILLIAM A. DOYLE, attorney for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

This court would be justified in affirming this case for non-compliance with the rules of this court as to briefs. There is no pretense of compliance with the rules as to making "a short clear statement of the points and the authorities in support thereof," and there is not a single authority cited.

No point is presented by the assignment of errors except that the verdict and judgment are wrong. Appellant's "Brief and Argument" does not point out or refer to a single ruling of the trial court either in admitting or excluding testimony or in instructing the jury, which it is claimed is erroneous. Neither is there any conduct on the part of the jury or even of adverse counsel as to which complaint is made.

It is for the jury to determine the questions of fact. They have done so, and we see no reason to criticise their conclusion. They did just right.

The judgment of the Circuit Court is affirmed.

Henry Lindeman v. Frank L. Fry et al.

1. **DAMAGES**—\$1,450 *Not Excessive*.—When the evidence as to the usual and customary compensation of an architect for performing services is conflicting, and a verdict rendered for \$1,450, the court can not say that the verdict is contrary to the weight of the evidence in this case.

2. **INSTRUCTIONS**—*Ignoring Evidence*.—An instruction which in effect asks the court to ignore evidence is properly refused.

Assumpsit, for architect's services. Trial in the Circuit Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the March term, 1898. Affirmed. Opinion filed June 18, 1898.

BARKER & CHURCH, attorneys for appellant.

SMITH, SHEDD, UNDERWOOD & HALL, attorneys for appellees.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment in assumpsit by appellees against appellant, for the sum of \$1,450. The evidence shows that the appellees, who are architects and were in partnership as such, were employed by the appellant to prepare plans and specifications for four three-story brick and stone flat buildings one hundred feet in width, by fifty-seven feet in depth, and to superintend the construction of the buildings, and that they prepared the plans and specifications and superintended the erection of the buildings. It was stated on the trial by counsel for appellant, that there was no denial of services; that appellant's only defense was that the buildings were not properly superintended; that many things which, by the specifications, were to have been put in the buildings, were not put in, and that classes of material which were to have been put in were not put in.

Appellant introduced evidence tending to prove the defense above stated, and the appellees produced evidence in rebuttal to the effect that material which was omitted, and changes

in material which were made, were omitted and made with appellant's consent and approval, and that the work was fair average work. Appellees also produced a witness in rebuttal, who testified that, after the work had been completed, in January, 1894, he and appellee Fry and appellant looked the building over, and that appellant and Fry accepted all the work except the carpenter work and the painting, and that they decided to hold back and did hold back \$560 from the carpenter and \$380 from the painter, which amounts they estimated would be sufficient to complete the work.

Appellant, in sur-rebuttal, denied this, but he had previously denied that he employed appellees at all, notwithstanding his counsel's statement on the trial that there was no denial of the services of appellees, and the credibility of the witnesses was a matter to be passed on by the jury.

It is to be inferred from the evidence that different parts of the construction of the building were let to different contractors, but none of the contracts were put in evidence, and without examination of the contracts, it can not be known with certainty the kinds of material and the quality of work which each contractor was to furnish and perform. It can not be assumed, in the absence of proof, as it seems to be in the argument of appellant's counsel, that the specifications introduced in evidence formed a part of each contract. It sometimes happens in such cases that, by the contract proper, certain parts of the specifications prepared by the architect are excluded or modified.

It is claimed that the damages are excessive. The evidence as to the usual and customary compensation of an architect for performing such services as were performed by appellees, was conflicting, and we can not say that the verdict is contrary to the weight of the evidence in that regard.

Appellee Fry testified that the building cost about \$28,000 and the fixtures over \$1,000, and this was not contradicted, and he and two other witnesses testified that the customary compensation for such services was five per cent on the total cost of building and fixtures.

The refusal of the court to give the following instruction is assigned as error :

“ The jury are instructed, that if they believe from the evidence, that the plaintiff in this case did not use reasonable care and diligence in the performance of his work as an architect, and the buildings of defendant were not properly constructed, then the defendant may recoup or set off the damages he may sustain on that account. And if, from the evidence, the jury find that the damages sustained are equal to, or greater than, the amount plaintiff might claim for services, then the jury should find for the defendant.”

The instruction was properly refused. If the jury had found that the buildings were improperly constructed and that the plaintiffs had not exercised reasonable care and diligence, then, under the instruction, they must have found for appellant, even though they believed that the improper construction was not the fault of appellees.

The instruction is erroneous in another respect. Appellees' evidence showed that the carpenter's and painter's work was not complete, and that appellant accepted the work with knowledge of its incompleteness. This evidence the court is, by the instruction, asked to ignore, and in effect to exclude it from the jury.

We find no ground for reversal in the record. The judgment will be affirmed.

Thomas Lord v. Albert Haufe.

1. **EVIDENCE—Existence of Contracts a Question of Fact.**—The question as to whether a contract existed between the parties is one of fact for the determination of the jury.

2. **CONTRACTS—Under Seal Not to be Varied by Parol.**—The terms of executory contracts under seal can not be changed by parol.

3. **TRIALS—Before the Court Without a Jury.**—Where there is a conflict of testimony in a case tried before the court without a jury, and there is sufficient competent evidence to sustain the finding, it will not

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be disturbed on error or appeal for the reason that the finding is against the weight of the evidence.

Assumpsit, for rents. Trial in the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Finding and judgment for plaintiff. Appeal by defendant. Heard in this court at the October term, 1897. Reversed. Opinion filed June 18, 1898.

HARVEY B. HURD and SMITH, HELMER, MOULTON & PRICE, attorneys for appellant.

CRATTY BROS., JARVIS & CLEVELAND, attorneys for appellee.

MR. JUSTICE WINDES delivered the opinion of the court.

Appellant, by his lease, under seal, demised the premises 86 Wabash avenue, Chicago, to appellee for a term beginning February 1, 1891, and ending December 31, 1895, the rent being payable in monthly installments of \$708.33. It also provided that Lord should make certain alterations and improvements, including a new passenger elevator and new freight elevator, to be run by hydraulic compression, with electric motor power, and an electric motor to be furnished by Lord. Appellee took possession in January, 1891, and on February 15, 1891, he ordered the Edison Electric Light Co. to provide the building with electric power to operate the elevators, and agreed to pay therefor according to certain rates per month specified in the order, but no time was fixed during which the power should be furnished. Lord had nothing to do with the contract for electric power, and did not know of it until some time after it was made. Lord furnished an electric motor, which proved unsatisfactory and was taken out and replaced by another, which was put in about July, 1891. Because of the insufficiency of the motor, appellee refused to pay rent. The matter was submitted to arbitration, the result of which was that appellee was allowed a reduction in his rent of about one and one-half months. He paid up after the arbitration, about June 3, 1891, but he also asked a reduction of his rent by the amount his electric power cost him above \$50 per month, because, as he claimed, the motor consumed more electricity than it should

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have done. This reduction was allowed by Lord, he claims, as a matter of grace and not because of any obligation, from time to time up to May 1, 1892, at about which date he sold his interest in the building. Appellee claims this reduction of rent was made and allowed by Lord pursuant to a verbal contract between him and Lord to pay to appellee the excess of the cost of electric power over \$50 per month during the entire term of the lease, and also that the agreement was made by Lord because appellee threatened to cancel the lease and abandon the premises by reason of trouble with the elevators, the machinery not being in order, and the excessive cost of power bills. The checks given by appellee for rent during the period for which Lord allowed the reduction were for the amount of rent less the excess of the cost of electric power to appellee over \$50 per month, most of the business being transacted with one Kirshner, who acted as agent for appellee. We have carefully considered the evidence as to this alleged verbal agreement, and are of opinion that it not only fails to establish the agreement by a preponderance of evidence, but on the contrary, we think, the clear weight of the evidence is there was no such agreement as is claimed by appellee. The agreement, if any was made, was with Kirshner in February or March, 1891, or in any event prior to June 3, 1891, when appellee made his first payment, being the rent due to June 30, 1891, less a rebate of one and one-half months' rent, which was allowed to him as the result of the arbitration above mentioned, and when he says he was allowed a reduction on account of excess in cost of electric power. Appellee's letter, written just one month after this first payment, and four months or more after Kirshner testifies he made the arrangement with Lord, is wholly inconsistent with any contract by which Lord was to pay the excess of cost of electric power over \$50 per month. The letter is, viz.:

"CHICAGO, July 3, 1891.

MR. THOMAS LORD:

DEAR SIR: I hereby hand you herein a check for \$645.13 for the July rent of building 86 Wabash avenue, having

deducted \$63.20 for overcharge for electric power, which you agreed to furnish at the very lowest possible price. You told my engineer that you would arrange this matter with the Reedy folks, but they claim they have nothing whatever to do with the matter, as you bought the motor, yourself, which consequently releases them of the responsibility. I am told by very good authorities, such as the Reedy folks and the Edison Co., that the charge for power for running this plant should not exceed \$40, or at the very most, \$50 a month, which sum I shall take as a basis for settling with you, although, according to your assertion, it would be only \$26 or thereabouts. I understand that the motor question could have been settled long ago if you had attended to it.

Yours respectfully,

ALBERT HAUFE."

If there had been an agreement with Lord, why did not appellee state it in this letter, instead of using the language in regard to the overcharge for electric power, viz., "which you agreed to furnish at the very lowest possible price," and why did he say he would take \$50 per month as a basis for settling with Lord? He says he had no talk with Lord on the subject after June, 1891, and Kirshner says that no more was said between Lord and him after the arrangement which he testifies was made between them in February or March, 1891; that he took the checks to Lord and got a receipt for the rent less the reduction.

If there was such arrangement, why should Kirshner, as he did, on May 10, 1892, when he knew Lord had sold out, sign in his own name and also the name of appellee, a receipt to Lord for \$9.33, in which he stated that it was "a favor in consideration of excess of electric power for the month of April?" There is only one reasonable answer to these queries consistent with the evidence in this record. It is that there was no agreement between appellee and Lord for the payment of this excess, but that Lord made the reductions from time to time as a matter of grace to appellee, and to avoid friction with a tenant who was paying a large rent—not because of any legal obligation on his part.

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Moreover, if it be conceded that there was such an agreement as claimed by appellee, there was no consideration to support it, and it was therefore *nudum pactum*.

By the lease appellee was bound to pay his rent. The matter of damages for not getting the premises ready as agreed by the lease, was adjusted by the arbitration, allowance made therefor, and settled in the payment of rent on June 3, 1891. He was under contract with the Edison Company to pay for the cost of electric power, with which Lord had nothing to do, and which was made without any reference to the alleged agreement of Lord to pay for any excess of cost of electric power. There is no obligation under the lease which required Lord to furnish elevators which could be operated by appellee in the conduct of his business, and for the accommodation of his tenants at any specified power or cost to appellee. And even if such obligation on Lord's part existed, still the evidence is clear that any claim which appellee had in that regard was not waived or released. On the contrary, long after the alleged agreement was claimed to have been made, we find appellee making a claim for damages on account of the elevators by his letter of June 25, 1891, viz.:

"MR. THOMAS LORD:

DEAR SIR: I do hereby notify you that I shall hold you responsible for any damage that I suffer through the elevators not running. Two of my tenants have notified me to-day that they will look for other quarters, as they can not stand the continuous interruption any longer. Besides it is generally known the elevators are out of order most of the time, which prevents my renting the other two lofts, for which I will also hold you responsible.

A. HAUFE."

Therefore, the evidence tending to show that appellee threatened to rescind the lease and abandon the premises, since such threats were at a time after the making of the alleged agreement, could not be the basis for a consideration. That it was in fact the consideration for the agreement, can not be claimed, for the further reason that it

would be wholly inconsistent with a waiver of appellee's right in this regard for him to insist he had this claim for damages in June, 1891, and at the same time say that he waived such right in order to get Lord to pay the excess of cost of electric power.

It can not be reasonably claimed, under the evidence in this record, as is done by appellee, that he believed he had a legal right to cancel his lease; that he in good faith made that claim, and his compromise of it by yielding what he believed was his legal right, formed a good consideration for the alleged agreement with Lord, because his conduct in claiming damages in June, 1891, is wholly inconsistent with a waiver of such damages as the basis for a contract made at a previous date. Appellee can not waive his right to damages and thereby establish a consideration for his contract with Lord, and then, when it suits his convenience, enforce the same damages against Lord.

The contention of appellee that he was induced by Lord's agreement to continue his contract with the Edison Company, which he had a right to terminate, as claimed by his counsel, is not, in our opinion, sustained by the evidence. Counsel only claim that it may be fairly inferred from the evidence that appellee continued this contract because of Lord's contract to pay the excess of cost of electric power, but we are unable to see how such inference may be drawn. It is not contended by counsel for appellee that if there was no consideration to support the agreement, that it is binding, and inasmuch as appellee was required by the terms of the lease to pay his rent, and he waived no right which he had under the lease, nor otherwise, because of the alleged undertaking of Lord, he can maintain no action upon it.

There is also another reason why appellee can not recover. The agreement, as claimed, is an attempt to vary the terms of an executory contract, under seal, by parol, which is not permissible. It amounted to no more than a change in the amount of rent to be paid. *Chapman v. McGrew*, 20 Ill. 101; *Loach v. Farnum*, 90 Ill. 368; *Alschuler v. Schiff*, 164 Ill. 298.

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The trial court admitted evidence, against the objection of appellant, of conversations between Lord and appellee preliminary to the execution of the lease between them as to improvements to be placed in the building, the kind of power to be put in for operating the elevators, and the probable cost of electric power. There is no claim that there was any fraud or mistake in making the lease. We therefore think any such conversations were merged in the written lease afterward made, and it was error to admit the evidence in this regard. It may be, as claimed by counsel, that this error is not cause for reversal, the trial being before the court without a jury, if there was sufficient competent evidence to sustain the finding, but, as we have seen, the other evidence was insufficient. Appellee having failed to establish the agreement claimed by a preponderance of evidence, having failed to show any sufficient consideration to support it, and the agreement as claimed being invalid as amounting to an attempt to change the terms of an executory contract, under seal, by parol, we have thought it unnecessary to consider the other questions discussed by counsel.

The judgment will be reversed.

Frank Salter v. Edward Hines Lumber Co.

1. **CONTRACTS—*Merger of Prior and Contemporaneous Parol Agreements.***—The rule that when the agreement of parties is evidenced by a written instrument signed by them, all prior and contemporaneous parol agreements are deemed merged in the written instrument, and, therefore, evidence of such parol agreements is inadmissible, relates solely to parol agreements between the parties to the written instrument, and not to declarations made by one of the parties to a stranger to the instrument.

2. **PARTNERSHIPS—*Liability of Incoming Partner.***—A new partner coming into an existing firm, will not be liable for debts contracted by the firm previously to his entering it, unless he expressly assumes them.

3. **SAME—*Liability of Incoming Partner—When Inferred.***—A special promise to assume liability may be inferred from the conduct of an incoming partner.

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Assumpsit.—Trial in the Superior Court of Cook County, on appeal from a justice of the peace; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the October term, 1897. Affirmed. Opinion filed June 18, 1898.

EDWARD MAHER and CHAS. C. GILBERT, attorneys for appellant.

GRAHAM H. HARRIS, attorney for appellee.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment of the Superior Court of Cook County, for the sum of \$100, in favor of appellee and against appellant, on appeal from a judgment rendered by a justice of the peace. The suit was originally commenced against appellant, Salter, Arthur J. Cox and F. W. Meckes, but was dismissed in the justice court as to Meckes and Cox, and judgment was rendered in that court against appellant only.

Between the times of the trial in the justice's court and the trial in the Superior Court Meckes died. Cox and Meckes had been partners in the planing-mill business prior to October 12, 1894, under the firm name of Cox & Meckes, when Cox sold his interest in the business to Meckes and withdrew from the firm. Prior to the dissolution of the partnership, and about August, 1894, appellee sold to Cox & Meckes a bill of lumber amounting to \$224, which was unpaid at the date of the dissolution of the firm. Meckes, after the dissolution of his partnership with Cox, carried on the business alone until the 15th of November, 1894, when he and appellant Salter formed a partnership in the same business under the firm name of Salter & Meckes, at which time they made and signed the following agreement:

“OCTOBER 12, 1894.

Francis Salter and F. W. Meckes, under this date, form a copartnership as successors to F. W. Meckes, the new

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firm to be styled Salter & Meckes, and to carry on a general mill business at 62nd and La Salle streets.

F. Salter has purchased an equal half interest in the business of F. W. Meckes for the sum of \$5,000, and \$3,000 of this amount is paid by surrender of mortgage note to said F. W. Meckes, and by payment of \$2,000 in cash. His purchase is based on the following conditions:

First. That said F. W. Meckes agrees to pay and save F. Salter harmless from all amounts against the firm of Cox & Meckes or F. W. Meckes in excess of \$7,353.25, which was shown by statement of ledger account November 1, 1894.

Second. That said statement is a true and correct statement of the accounts due said firm, amounting in the aggregate to \$7,481.17.

Third. It is further agreed that the firm of Salter & Meckes have articles of agreement regarding salaries, loans, interest, etc., as shown in special writing.

FRANCIS SALTER.

F. W. MECKES."

Although the agreement is dated October 12, it is admitted that it was, in fact, made and executed November 15, 1894. It was probably antedated to correspond with the date of the dissolution of the partnership of Cox & Meckes.

Appellant Salter withdrew from the firm December 28, 1894, having been a partner in the business only one month and thirteen days. It appears from the evidence that the books of the firm of Cox & Meckes were used by the new firm, Salter & Meckes, being stamped Salter & Meckes, successors to, etc.; that all moneys received, whether from debtors of Cox & Meckes, or of Salter & Meckes, were deposited in bank to the credit of Salter & Meckes, and that separate accounts were not kept of moneys received from the debtors of the old firm or paid to the creditors of the old firms, also that the new firm continued doing business with the firm with which the former firm had dealt.

E. L. Welk, bookkeeper for Salter & Meckes, and formerly for Cox & Meckes, testified that shortly before the

contract was signed, he asked appellant if it was understood that he was to come in as a partner with Mr. Meckes and succeed Mr. Cox, who had retired from the firm, and assume the accounts and liabilities, and he said "Yes."

Cox, former partner of Meckes, testified that after appellant formed his partnership with Meckes, he tried to sell out his interest to him, Cox, and said that he was responsible on those old accounts; that he had property, and that Cox was not responsible.

Alexander Lendrum, an agent of creditors of the firm of Cox & Meckes, testified that November 16, 1894, he called on appellant and informed him that his business was to get a check for lumber sold by his principal to Cox & Meckes August 14, 1894; that appellant asked him what the account was, and said he had just become a member of the firm; that he had assumed the accounts of Cox & Meckes, and would see that a check was mailed in a few days.

Studt, an employe of appellee, testified that on November, 1894, he saw Salter at his office and informed him that he had come to collect the bill of the Hines Lumber Co.; that Salter asked him if he had come from Hines, to which the witness answered yes, when Salter said he would pay the bill in a week or ten days at latest; that he had bought an interest in the concern and would pay appellee as soon as everything was straightened up. Welk, bookkeeper for Salter & Meckes, testified that he drew a check in favor of the Hines Lumber Co., of date December 6, 1894, for \$124, by the direction of appellant, who said at the time that the witness should make the check \$124, so as to leave the balance \$100.

The trial court, for some reason not apparent to us, ruled against the introduction of the check in evidence, but it was proved by another witness that appellee received the check, and it was paid, leaving a balance due on appellee's bill of \$100.

William A. Herbert, collector for Condon & Co., testified that about the middle of November, or first of December, he asked Salter for money on account, and that Salter said he had assumed the liabilities there.

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C. F. Wiehe testified that he was present at the trial before the justice, and heard F. W. Meckes, since deceased, testify. This witness' testimony was substantially as follows: "Mr. Meckes testified that it was talked between him and Mr. Salter that the firm of Salter & Meckes—that Mr. Salter was to buy a half interest in the firm. For that half interest he was to pay \$2,000 in cash, and the firm was to assume the liabilities of the concern, and they were to take in turn for that plant and good book accounts, as near as I can recollect at that time—they were to take the good book accounts, and the firm of Salter & Meckes were to pay all liabilities. That is the substance. He said the liabilities of the firm of Cox & Meckes." On cross-examination the witness said that Meckes, in his testimony, did not fix the date of the conversation with Salter, but he (the witness thought) stated that it occurred after the signing of the paper, of date October 12th.

Appellant was the only witness in his own behalf. He denies the circumstances testified to by Meckes, and denies that he told Studt or Cox that he had assumed the debts of Cox & Meckes, but is silent as to the testimony of Lendrum and Herbert, and claims that he directed separate accounts to be kept of the debits and credits of the old firm, which was denied by the bookkeeper Welk, but disclaims knowledge as to whether such accounts were or not kept. He also denies the conversation testified by Welk to have occurred before the signing of the writing of date October 12th.

Appellant's counsel object that the testimony of Welk as to the conversation between him and appellant is incompetent, for the reason that the conversation was prior to the execution of the agreement of date October 12th. This objection appears to be based on the rule that when the agreement of parties is evidenced by a written instrument signed by them, all prior and contemporaneous parol agreements are deemed merged in the written instrument, and therefore evidence of such parol agreements is inadmissible. This rule, however, relates solely to parol agreements

between the parties to the written instrument, and not at all to declarations made by one of the parties to a stranger to the instrument, and the evidence objected to merely tends to prove such a declaration. Appellant testified and his counsel contend, that he had no interest whatever in the accounts due to, or the liabilities of the firm of Cox & Meckes. We think this inconsistent with the written agreement in evidence. Appellant testified that he wrote the paper, dated October 12th, in pencil; that Welk, the book-keeper, copied it, and he, appellant, signed it.

Prior to the drafting of the agreement, the witness Welk prepared a statement showing the liabilities of the firm of Cox & Meckes to be \$7,353.25, and the accounts due that firm to be \$7,481.17.

In the agreement written by appellant himself, the accounts due the former firm are set down at \$7,481.17, and the agreement contains this provision: "That said F. W. Meckes agrees to pay and save F. Salter harmless from all accounts against the firm of Cox & Meckes, or F. W. Meckes, in excess of \$7,353.25, which was shown by statement of ledger account, November 1, 1894." If appellant purchased no interest in the account due the former firm, and was not to assume any responsibility in regard to that firm's liabilities, why were those accounts and liabilities mentioned in the agreement, and why was appellant so particular as to require an express agreement from Meckes, that he, Meckes, would save appellant harmless from all liabilities of the former firm in excess of \$7,353.25, which was the total estimated amount of such liabilities? And why did he require the further agreement from Meckes that Meckes would, himself, pay all liabilities in excess of the last named amount—something which Meckes would have been bound to do, in the absence of any such stipulation? The agreement, as we think, conclusively shows that the half interest purchased by appellant in the business, included a half interest in the accounts due the firm of Cox & Meckes, and that the consideration moving from appellant was not only the sum of \$5,000 mentioned in the agree-

ment, but, in addition thereto, the assumption of the liabilities of Cox & Meckes. Whether appellant assumed the sole responsibility for such liabilities or responsibility jointly with Meckes, it is not necessary to inquire, because, in either case, Meckes having departed this life, the action could proceed only against appellant. If the foregoing views are correct, there was, by necessary implication, a promise by appellant, for a good and valid consideration, to pay the liabilities of the former firm of Cox & Meckes, and such promise being for the benefit of the creditors of the former firm, actions may be maintained against appellant in their names.

But appellant's counsel contend that such an agreement can not be implied; that to make appellant liable he must have expressly agreed to pay; citing *Wright v. Brosseau*, 73 Ill. 383. The language in the case on which appellant's counsel rely is as follows: "It is the clearly established doctrine, that a new partner coming into an existing firm, will not be liable in respect to debts contracted by the firm previously to his entering it, unless he expressly assumes them." This language is not, in our opinion, equivalent to a statement that there must be an express agreement or promise to pay, nor do we think that the court, in the case cited, intended to commit itself to the doctrine that liability of an incoming partner for the former debts of the firm could not, in any case, be inferred or implied from circumstances, however strong, and this view is strengthened by the opinion of the court in *Frazer v. Howe et al.*, 106 Ill. 563, in which the court say:

"While it is true that the incoming partner, in the case of the fluctuation of partners, or substitution of one partner for another, is not, in general, liable in respect of debts contracted by the firm previously to joining, yet there are exceptions to the rule, and it has been held, that 'payment of interest of old debts, length of standing in the firm, knowledge of the state of the books, accompanied with benefit derived from the contracts on which they are founded, will be evidence from which a jury may infer the assent of the incoming partner to debts previously contracted by the firm.

Collyer on Partnership, Perkins' Ed., Sec. 522. Parsons, in his work on Partnership, p. 435, says: 'On the whole, we should say that the law of contracts and the law of partnership lead to the conclusion that the new partner is not bound to the old creditors, unless on a promise to them for a consideration, both of which might, of course, be indirect, and implied by circumstances. Whether the new incoming partner has thus assumed the old debts, is sometimes a difficult question of mixed law and fact. It certainly may be implied by circumstances, and what circumstances should in any one case, imply it, is a question partly for the court and partly for a jury.' And after giving illustrations, he adds: 'And in general, whatever might be the form or technical effect of the contract, if, in substance, it amounted to an agreement by the incoming partner to share in the debts due from the firm, he would be held accordingly.' It was said by Lord Eldon, in *Ex parte Reece*, 6 Ves. Jr. 604, in speaking of this question: 'Slight circumstances might be sufficient, where, in the original transaction, the party to be bound was not a partner, but at the subsequent time had acquired all the benefit as if he had been a partner in the original transaction, and it would not be unwholesome for a jury to infer largely that that obligation clearly, according to conscience, had been given upon an implied authority.' See also *Cross v. National Bank*, 17 Kans. 336.

A special promise to assume liability may be inferred from the conduct of an incoming partner. *Ringo v. Wing*, 49 Ark. 457.

The statements of appellant that he had assumed the liabilities of the former firm, his promises to pay such liabilities, and his actual payment of \$124 on appellee's bill, are evidence that he understood his agreement with Meckes as binding him to responsibility for and payment of such liabilities. The evidence of Meckes before the justice of the peace shows that he also so understood the agreement, and when the sense in which the parties to an agreement understood it is ascertained, the agreement will be interpreted in that sense, if consistent with its words. The judgment will be affirmed.

**First National Bank, Lapeer, Michigan, v. Simcoe
Chapman et al.**

1. **BILL IN AID OF EXECUTION—Necessary Allegations.**—In a bill to remove alleged fraudulent conveyances out of the way of an execution issued upon a judgment recovered by the complainant, it is not necessary to allege the return of an execution. It is sufficient to allege that the complainant obtained judgment and that the conveyances set forth in the bill were fraudulent.

Bill to Remove a Fraudulent Conveyance.—Trial in the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Hearing on general demurrer and bill dismissed. Appeal by complainant. Heard in this court at the March term, 1898. Reversed and remanded. Opinion filed June 29, 1898.

GEORGE B. POWER and S. LAING WILLIAMS, attorneys for appellant.

No appearance for appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

The bill of complaint in this case was filed to remove alleged fraudulent conveyances out of the way of an execution issued upon a judgment recovered by the complainant. The bill sought no other relief. It was, however, alleged in the bill that an execution had issued on the judgment, and that afterward an alias execution was issued which was still in the hands of the sheriff unreturned and no part satisfied. A general demurrer to the bill of complaint was sustained and the bill dismissed.

The only ground suggested upon which the demurrer was sustained is that the bill failed to allege the return upon the first execution. This was unnecessary. It was sufficient in this behalf that the complainant had obtained judgment and that the conveyances set forth in the bill were fraudulent. *Miller v. Davidson*, 3 Gil. 518; *Weightman v. Hatch*, 17 Ill. 281; *Shufeldt v. Boehn*, 96 Ill. 560; *Fusze v. Stern*,

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17 Ill. App. 429; *Binnie v. Walker*, 25 Id. 82; *Quinn v. The People*, 45 Id. 547.

No allegation was necessary as to return of an execution, and, having needlessly alleged that two executions had issued, it was enough to show that the alias unsatisfied was then in the hands of the sheriff.

The demurrer should have been overruled. The decree is reversed and the cause remanded.

American Surety Co. v. United States of America, for use of Alexander Watt.

1. **CONSTRUCTION OF STATUTES**—*The Act of Congress for the Protection of Persons Furnishing Materials and Labor for the Construction of Public Works.*—The provisions of the act of Congress approved August 18, 1894, relating to furnishing an affidavit to the department of the government, has reference only to the procuring of the copy of the contract and bond, and is not a prerequisite to the right to maintain an action. This requirement is for the purpose of satisfying the government official that the person has furnished labor or material on the particular contract.

2. **EVIDENCE**—*Copies of Books and Records of U. S. Executive Departments.*—Under Section 882, Rev. Statutes of the United States, copies of any books, records, papers or documents in any of the executive departments, authenticated under the seals of such departments, respectively, are to be admitted in evidence equally with the originals thereof.

3. **SUPERIOR COURT**—*Of Cook County—Its Jurisdiction.*—The Superior Court of Cook County has jurisdiction of actions arising under the act of Congress, providing that the person supplying labor shall have a right of action, and shall be authorized to bring suit in the name of the United States for his use and benefit against the contractor and sureties, provided it shall not involve the United States in any expense.

4. **PRACTICE**—*Suits in the Name of the United States for the Use of Others.*—The Government of the United States has no interest in an action which is brought for the use of another alone; it is a mere nominal party, and can not control the proceedings or judgment in the case.

5. **SAME**—*Limiting Counsel in Argument.*—Counsel was limited in his argument, and after consuming the time allowed him, stated to the court that he could not present his case to the jury in the time limited, and the court gave him two minutes additional, but he declined to con-

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sume the additional time, and said that he preferred to stand upon the record as it was, and took an exception. It was held that he should have used the time given him, and then, if he had not finished his argument, and the court refused him further time, he could have taken his exception.

Debt on Surety Bonds.—Trial in the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the March term, 1898. Affirmed on remittitur as ordered. Opinion filed June 29, 1898.

STATEMENT OF FACTS.

Linden W. Bates, as principal, and appellant as surety, made their joint and several bond in the penal sum of \$43,200 to the United States of America, which recited that Bates had on January 25, 1895, entered into a contract with the United States for constructing and delivering one hydraulic dredge, and conditioned that if Bates should observe and perform the conditions, covenants and agreements of his said contract, including the covenant that Bates should be responsible for all liabilities incurred in the prosecution of the work for labor and materials, and should promptly make payment to all persons supplying him labor and materials in the prosecution of the work provided for in said contract, then said bond should be void, otherwise to remain in full force and virtue. The bond was given under and pursuant to an act of Congress for the protection of persons furnishing materials and labor for the construction of public works, which provides, in substance, that any person entering into a formal contract with the United States for the prosecution and completion of any public work, etc., shall be required, before commencing such work, to execute a penal bond with sufficient sureties, with the additional obligations that such contractor shall promptly make payments to all persons supplying him with labor and materials in the prosecution of the work provided for in such contract; and any person making application therefor and furnishing affidavit to the department under the directions of which said work is being or has been prosecuted, that labor

or materials for the prosecution of such work has been supplied by him, and payment for which has not been made, shall be furnished with a certified copy of such contract and bond, upon which said person supplying such labor, etc., shall have a right of action, and shall be authorized to bring suit in the name of the United States for his use and benefit against said contractor and sureties, and to prosecute the same to final judgment and execution.

In the prosecution of the work under the contract mentioned in the bond, Bates employed Alexander Watt, a foreman and dredge superintendent of seven years' experience, as superintendent of the work in constructing the hydraulic dredge at a salary of \$150 per month. He worked three months, hired men and superintended the work of launching twenty-four pontoons or floating iron vessels at Cairo, Illinois, which were part of the dredge contracted to be constructed by Bates, but received on account of his salary only \$20, which he collected from men at Cairo, and directed to be charged to him. During the three months he was sick nine days, but during that time directed the work, giving the men employed at the work instructions as to what they should do twice each day. Suit was brought in the Superior Court in the name of the United States for the use of Watt against appellant only, and a trial before the court and a jury resulted in a verdict and judgment for appellee of \$43,200 debt and \$450 damages, debt to be discharged, etc., from which this appeal is prosecuted.

ULLMANN & HACKER and FREDERIC F. NORCROSS, attorneys for appellant.

E. G. LANCASTER, attorney for appellee.

MR. JUSTICE WINDES delivered the opinion of the court.

Appellant claims, first, that plaintiff failed to make out a case, and the court erred in not taking it from the jury; second, that the court erred in admitting in evidence the agreement made by Bates with the United States; third, that the Superior Court was without jurisdiction of the sub-

ject-matter; fourth, that the court erred in refusing an instruction for the defendant; fifth, that the verdict is excessive; and, sixth, that the court erred in limiting appellant's counsel in argument to the jury.

1st. The evidence shows an agreement between Bates and the United States, under which Bates agreed to furnish all required material and labor needed in the construction of a hydraulic dredge for a price named, the dredge to be delivered at Cairo, Illinois, and to pay all liabilities incurred in the prosecution of the work for labor and material; also that Bates and appellant execute the bond above set out; also that Bates employed Watt to go to Cairo where Bates was building the hydraulic dredge for the government; that Watt superintended the work at Cairo of launching pontoons, which were part of the dredge, and was engaged at the work three months; that Watt was to have a salary of \$150 per month; that he made reports of his work to Bates and signed them as superintendent, and he was not paid for his work except the sum of \$20. This, we think, made a *prima facie* case for recovery, and that the court did not err in refusing to instruct the jury to find for defendant. The provision of the act as to furnishing an affidavit to the department of the government, only has reference to the procuring of the copy of the contract and bond, and is not a prerequisite to the right to maintain an action.

This requirement is made to satisfy the government official that the person has furnished labor or material on the particular contract.

2d. The agreement between Bates and the United States is indorsed: "A true copy. Graham D. Fitch, Captain Corps of Engineers," has the seal of the chief engineer of the war department affixed to it, and was received by Watt from the government with a copy of the bond. Section 882, Rev. Stat. of the United States, provides, viz.: "Copies of any books, records, papers or documents in any of the executive departments, authenticated under the seals of such departments, respectively, shall be admitted in evidence equally with the originals thereof." The agreement was therefore properly admitted in evidence.

3d. We think the contention that the Superior Court had no jurisdiction is not tenable. The act of Congress provides that the person supplying the labor "shall have a right of action, and shall be authorized to bring suit in the name of the United States" for his use and benefit against the contractor and sureties, provided it shall not involve the United States in any expense, and that the court in which such action is brought is authorized to require proper security for costs in case judgment is for the defendant. It will be seen there is no limitation as to the court in which the suit may be brought, and the act empowers the court to require proper security for costs. The United States has no interest in the action which is brought for the use and benefit of Watt alone, as a mere nominal party, and can not control the proceedings or judgment in the case. So far as concerns the matter of jurisdiction, the suit is the same as if brought by Watt alone. *State of Maryland, for use, etc., v. Baldwin*, 112 U. S. 490.

4th. The abstract fails to show that the trial court refused to give any instruction asked by appellant, or that any exception was preserved to any such supposed refusal. Under such condition of the abstract, we are not required to search the record to discover whether there was error. *Gibler v. City of Mattoon*, 167 Ill. 18.

We, however, are inclined to think there was no error in refusing the instruction, which, it is claimed, the court refused to give. *Mining Co. v. Cullins*, 104 U. S. 176.

5th. We think the verdict is excessive by the amount of \$20, which Watt admits he received while working at Cairo, and which he, when reporting upon his work there, directed to be charged to him. He made the application, and it was too late for him, as he attempted to do, at a later date, to make an application of this collection to another account between him and Bates.

6th. It appears that counsel for appellant had only six minutes in which to argue the case to the jury. It is stated in the brief that the case was tried on the short cause calendar, though the record fails to show it. When counsel had consumed six minutes in his argument to the jury, he was

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notified by the court that his time was up, whereupon he stated he could not present his case to the jury in the time limited, and the court gave him two minutes additional, but counsel declined to consume the additional time given by the court, and said that he preferred "to stand upon the record as it is," and took an exception. We think counsel should have used the time given him by the court, and then, if he had not finished his argument, and the court refused him further time, he could have taken his exception. Counsel are in no position, having declined to use the time given by the court, to claim there was reversible error in the court's ruling.

In *People, etc., v. Darrow*, 70 Ill. App. 22, it was held that a limit of seven minutes to the argument in a short cause case, involving an open account of larger amount than this case, was not reversible error. This has been affirmed by the Supreme Court, 172 Ill. 62.

The judgment is affirmed if a remittitur of \$20 from the damages is entered by appellee in ten days.

Appellee will pay costs in this court.

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Oliver W. Marble v. William H. Thomas, Caroline Thomas, William F. Thomas, Benjamin M. Thomas, D. R. Thomas, Mathilda L. Thomas, Mary A. Thomas, Carrie M. Thomas, Isabella B. Thomas and Nora Gridley.

1. **EQUITY PRACTICE**.—*Failure to File Exceptions to Master's Report.*—Where a party fails to file his exceptions to a master's report in the court below, the Appellate Court will consider all questions of fact conclusively settled by the findings of the master.

Creditor's Bill.—Trial in the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding; hearing and decree dismissing the bill. Appeal by complainant. Heard in this court at the October term, 1897. Affirmed. Opinion filed June 29, 1898.

HENRY L. REXFORD, attorney for appellant; SAMUEL M. BOOTH, of counsel.

JOHN G. HENDERSON, attorney for appellees.

Every question raised by the assignment of errors in this court, is here raised for the first time. Such a practice is not tolerated.

The rule is well stated in *Singer v. Steele*, 125 Ill. 426, 429, as follows:

"The practice is, where a party is dissatisfied with the finding of the master in chancery, he shall make distinct exceptions, so the court can readily understand what matters are at issue between the parties, otherwise it will be understood he acquiesces in the conclusions and findings of the master. According to the well settled practice, the court in this case first determined, by its interlocutory decree, the rights of the parties, and fixed the basis upon which the account should be taken, and then referred the cause to the master in chancery. On the coming in of his report, if the party was dissatisfied with its conclusions or findings, it was his privilege to file exceptions specifically pointing out the errors thought to have been made by the master, which could be readily determined by the court. That was not done by complainants, and they will not now be heard to make objections to the master's report, which they did not take and insist upon in the trial court." See also *Reigard v. McNeil*, 38 Ill. 401; *Dates v. Winstanley*, 53 Ill. App. 627; *Hewitt v. Dement*, 57 Ill. 500; *Clark v. Laughlin*, 62 Ill. 278; *Brainerd v. Hudson*, 108 Ill. 218, 221; *Cheltenham Improvement Co. v. Whitehead*, 128 Ill. 285; *Reedy v. Millizen*, 155 Ill. 648.

But even if proper objections had been filed with the master, followed by necessary exceptions in the trial court, this court would never disturb the report of the master.

"The finding of a master in matters referred to him, in regard to the facts established by the testimony, is as conclusive upon the parties as the verdict of a jury in a civil cause, and will be reviewed or set aside only for the same reasons that a verdict would be." *Whitcomb v. Duell*, 54 Ill. App. 650; *Bartholomae & Roesing Brewing Co. v. Schroeder*, 67 Ill. App. 560, 564; *Hudek v. Ennesser*, 66 Ill.

App. 609; Friedman v. Schoengen, 59 Ill. App. 376; Williams v. Lindblom, 163 Ill. 346.

MR. JUSTICE WINDES delivered the opinion of the court.

Appellant filed a creditor's bill on a judgment in his favor against the appellee William H. Thomas, making as defendants thereto said Thomas and nine others. Several amendments were made to the bill in which, and the original bill, the usual charges and allegations of the ordinary creditor's bill were made, including the charge that the judgment debtor was interested in and the owner of certain real estate, which is specifically described. The bill did not waive answers under oath; the defendants filed answers under oath, denying the principal allegations of the bill and amendments, and after replications filed the cause was referred to the master to take proof and report his opinion on the law and evidence.

The master reported, among other things, that the equities are with the defendant, William H. Thomas, and that he has no interest, legal or equitable, in the property described in the bill, or in any other property, real or personal, of any nature, kind or description.

Objections to the master's report were filed with the master, raising certain questions of fact on the report, which were overruled by the master. A hearing was had before the chancellor upon the pleadings, the master's report and evidence taken before him, but no exceptions were filed in the court to the master's report.

A decree was entered approving and confirming the master's report and dismissing the bill at complainant's costs, but the decree is not shown by the abstract, which is sufficient of itself to justify the court in confirming the decree. No questions of law are presented by appellant's brief—only questions of fact, all of which are conclusively settled by the findings of the master, there being no exceptions taken thereto before the chancellor. Singer v. Steele, 125 Ill. 426-9; Cheltenham, etc., Co., v. Whitehead, 128 Ill. 285.

The decree is affirmed.

John Holmes v. John M. Tarble et al.

1. **PLEADING**—*By the Defendant.*—The defendant may plead as many matters of fact in several pleas as he may deem necessary for his defense, and each of such pleas may be inconsistent with the others.

2. **JURY**—*Not to Pass upon the Issues Separately.*—It is not necessary for the jury to pass on the issues formed by different pleas separately, nor is it the practice.

3. **REPLEVIN**—*General Verdict in.*—A general verdict for the defendant in a replevin suit is, as against the plaintiff, a finding on all the issues.

Replevin.—Error to the Superior Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the March term, 1898. Affirmed. Opinion filed June 29, 1898.

C. STUART BEATTIE, attorney for plaintiff in error.

NEANDER N. CRONHOLM, attorney for defendants in error.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

This was an action of replevin by plaintiff in error against John M. Tarble, Nils Bennett and Olaf Anderson, defendants in error, for three horses. The horses were taken on the writ and delivered to the plaintiff.

The declaration contained a count in replevin in the *detinuit* and a count in trover. The defendants pleaded to the first count three pleas, namely: first, *non detinuit*; second, property in the defendants; third, that the plaintiff being possessed of the horses, as of his own property, delivered the same to the defendants Anderson and Bennett, they being agisters, for the purpose of feeding and pasturing, etc.; that they did feed and pasture, etc., and the plaintiff became indebted to the defendants therefor in the sum of \$400. Wherefore defendants retained the property, etc. To the count in trover the defendants pleaded not guilty. The plaintiff took issue on these pleas, and the jury found the following verdict: "We, the jury, find the

issues for the defendants, and assess the defendants' damages at the sum of \$229." A motion for a new trial was overruled, and judgment was rendered for the defendants and for a return of the property, and damages, to the rendition of which judgment the plaintiff excepted. The record contains no bill of exceptions.

Plaintiff's counsel contends that the verdict is not responsive to all the issues and is inconsistent, and therefore the judgment is erroneous. Section 28 of the Practice Act provides: "The defendant may plead as many matters of fact in several pleas as he may deem necessary for his defense," etc., and each of these pleas may be inconsistent with the others (*P. & P. U. Ry. Co. v. Barton*, 38 Ill. App. 475), and this is common practice. It is not necessary that the jury shall pass on each of the issues separately, nor is it the practice. In *Underwood v. White*, 45 Ill. 437, the pleas were *non cepit*, *non detinuit*, a traverse of property in the plaintiff, property in defendant, and, lastly, property in third persons. The verdict was, "We, the jury, find the issues for the defendant." Held, that by reason of the plea traversing the right of property in the plaintiff and averring property in another, the right of property was in issue, and a judgment for the defendant awarding a return of the property was proper, and the judgment was affirmed. See also *Wells on Replevin*, Sec. 753.

"A general verdict for the defendant in a replevin suit is, as against the plaintiff, a finding on all the issues." *Cobbey on Replevin*, Sec. 1060.

In *McClure v. Williams*, 65 Ill. 390, an instruction that the burden was upon the defendant to prove each of the several issues formed by the pleadings, was held erroneous, the court saying, *Ib.* 392: "This should have been qualified by informing them that if he, however, maintained by proof any one of the issues, he would be entitled to a verdict. Unaccompanied by any such explanation, the jury were liable to believe all of the issues must be found in his favor, to entitle him to a verdict; while all persons in the profession know that if a defendant plead and proves one plea in law,

he is entitled to judgment." This is analogous to the practice in case of a declaration containing a number of counts, when, although the evidence may be applicable to and prove only one of the counts, a general verdict finding the issues for the plaintiff is sufficient, and the plaintiff is entitled to judgment, the unproved counts being disregarded. In the present case, the defendants having traversed property in the plaintiff and averred property in themselves, it must be presumed, in the absence of evidence to the contrary (the evidence not having been preserved by bill of exceptions), that the plea was proved, and the plea being proved the defendants were entitled to judgment, and to a return of the property and damages for its detention. In the absence of a bill of exceptions preserving the evidence, the presumption is in favor of the judgment. *Brennan v. Shinkle*, 89 Ill. 604.

The judgment will be affirmed.

Caspar Wehner v. Frank Wehner, use of Enterprise Paint Mfg. Co.

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1. **OFFICER'S RETURN**—*When to be Treated as Absolutely True*.—The law does not permit a defendant when removing a case from a justice of the peace to the Circuit Court on a writ of certiorari to contradict the official return of the officer serving the summons. Such return must be treated as absolutely true.

Certiorari Proceedings.—Error to the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the March term, 1898. Affirmed. Opinion filed June 29, 1898.

NATHAN NEUFELD, attorney for plaintiff in error.

DAVID JETZINGER, attorney for defendants in error.

MR. JUSTICE WINDES delivered the opinion of the court.

Plaintiff in error was sued by defendants in error May 19, 1897, before a justice of the peace, where judgment was

obtained June 1, 1897, for \$121.95. He claims that the first knowledge that he had that he had been sued, or that a judgment had been rendered against him, was when an execution was presented to him by a constable after the time for an appeal had elapsed. He filed his petition for a certiorari in the Circuit Court, setting out the judgment before the justice, and alleging that the time for appeal had passed before he had any knowledge of the suit or judgment; that there was no service of summons upon him; that he is an old man, seventy-eight years of age, is nearly deaf, in very feeble health, almost blind, and totally ignorant of the English language; that he was told by his wife that a man read some paper at the front door of his house about June 1, 1897, and when she asked the man what he meant and what it was about, he walked away without replying to her question; that petitioner had no idea or suspicion of the man's business; that his wife is but imperfectly acquainted with the English language, and that he is not now nor was he at any time in any way indebted to defendants in error or either of them, nor has he now or at any other time before or since the rendition of said judgment control of any funds or other property belonging to said Frank Wehner, but that Frank Wehner owes petitioner several hundred dollars, and that said judgment is wholly unjust and erroneous. On this petition the writ of certiorari was issued, on petitioner giving bond in the sum of \$250. Thereafter, and at the July term, 1897, a transcript was filed and defendants in error entered their appearance. At the October term, 1897, on motion of defendants in error, the Circuit Court quashed the writ of certiorari, dismissed the petition and awarded a procedendo to the justice of the peace and execution for costs. From this judgment this writ of error is prosecuted.

From the transcript of the justice and the return of the constable on the justice's summons, it appears that there was personal service of summons from the justice on plaintiff in error on May 26, 1897.

In *Fitzgerald v. Kimball*, 86 Ill. 396, where it appeared,

after an appeal by certiorari had been perfected, by the return of the constable on the justice's summons, that the defendant had been duly served with summons, and the writ was quashed, the court said: "The law does not permit a party, in such case, to contradict the official return of an officer. This return must be treated as absolutely true, and if true, the appellant was guilty of negligence in not making his defense, if any he had, before the justice of the peace. He can not be heard, under such circumstances, to allege that the judgment was not the result of negligence on his part, or say (as an excuse for not taking an appeal in the ordinary way) that he was ignorant of the existence of the judgment," and affirmed the judgment of the Circuit Court quashing the writ.

In *Sibert v. Thorp*, 77 Ill. 44, the general rule that an officer's return can not be disputed is recognized, but the court said: "While, however, this is the well established general principle, cases have occasionally occurred, and will continue to do so, which, in order to prevent the perpetration of a great wrong must be treated as exceptional;" and held that the return of the sheriff is not an absolute verity, but merely that it is *prima facie* evidence of the truth of the matter therein recited, and consequently that it might be put in issue by plea in abatement. To the same effect are *Union Nat. Bank v. First Nat. Bank*, 90 Ill. 58, and *Chicago, etc., Co. v. Congdon B. & S. Mfg. Co.*, 111 Ill. 309. We feel bound in the case at bar by the decision of the Kimball case, *supra*, but we are inclined to think the facts alleged in the petition make it one of those cases that occasionally occurs, and in which, that the perpetration of a great wrong may be prevented, an exception should be made. There seems to us no reason why a sheriff's return of service should be allowed to be put in issue by plea in abatement, in an original suit, which would not apply with equal force to a petition for certiorari, but the Supreme Court has in effect said there is a difference.

Defendants in error suggest in their brief that the petition was insufficient in that it failed to show by allegation

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of facts wherein the judgment was unjust and erroneous. In this contention they are supported by *McGeoch v. Hooker*, 11 Ill. App. 652, and *Chicago World Book Co. v. Brown*, 57 Ill. App. 527; but in *Gallimore v. Dazey*, 12 Ill. 143, a petition for certiorari which alleged that petitioner "was not indebted to the plaintiff on any account whatever," was held sufficient. This petition makes in substance the same allegation, and further says that Frank Wehner owes petitioner several hundred dollars, and that the judgment is wholly unjust and erroneous. We will be guided by the Supreme Court decision and hold the petition sufficient in this regard, and to be consistent, will also follow the *Kimball case*, *supra*, though in doing so we fear a serious wrong is done to plaintiff in error.

The judgment of the Circuit Court is affirmed.

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Lena Sagor and Moses Sagor v. Susan Gibson.

1. VERDICTS—*Unsupported by the Evidence*.—A verdict against two defendants, which is entirely unsupported by evidence so far as one of the defendants is concerned, will be set aside.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Verdict and judgment for plaintiff; error by defendant. Heard in this court at the March term, 1898. Reversed and remanded. Opinion filed July 21, 1898.

ROSENTHAL, KURZ & HIRSCHL, attorneys for plaintiffs in error.

BLAISDELL & McCASKILL, attorneys for defendant in error.

MR. JUSTICE SEARS delivered the opinion of the court.

This suit was brought by defendant in error to recover for injuries sustained, as is alleged, through negligence of plaintiffs in error, and the trial resulted in verdict and judgment for \$5,500 against both plaintiffs in error.

The negligence charged in each count of the declaration is the negligent building and construction of a door, which, by reason of its defective construction, fell upon defendant in error and injured her. There is no evidence proving or tending to prove that plaintiff in error Lena Sagor had anything whatever to do with the construction or building of the door in question. On the contrary, it is uncontroverted that Moses Sagor was the owner of the building and the one who let the several contracts for its construction. The verdict, therefore, was entirely unsupported by evidence, so far as Lena Sagor is concerned, and her motion for a new trial should have been granted.

It is doubtful if a verdict for any such amount could, upon the evidence here, be sustained as against the owner of the building, for lack of a sufficiently established connection between the most serious of the injuries complained of and the alleged cause thereof, viz., the falling of the door. But the reason first noted makes another trial necessary.

The judgment is reversed and cause remanded.

Will F. Wanless and Charles O. Knudson v. West Chicago Street Railroad Co.

1. INJUNCTION BOND—*When Good as a Voluntary Obligation.*—A bond given upon the issuing of an injunction under the order of the court, although not in compliance with the statute, is a voluntary bond, given on a good consideration—to wit, the issuing of the injunction—and if so, is binding on defendant in error as such.

Debt, on an injunction bond. Trial in the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Finding and judgment for plaintiff. Heard in this court at the March term, 1898. Reversed and remanded. Opinion filed July 21, 1898.

STATEMENT OF FACTS.

Defendant in error brought a bill for an injunction against plaintiffs in error to enjoin the collection by them of a

judgment against defendant in error for \$200. The injunction was issued on the recommendation of the master, upon defendant in error "filing bond agreeably to the statute." The statute applicable to such cases provides that the bond shall be "conditioned for the payment of all moneys and costs due to the plaintiff in the judgment, and such damages as may be awarded against the complainant in case the injunction is dissolved. If the injunction be dissolved, in whole or in part, the complainant shall pay, exclusive of legal interest and costs, such damages as the court shall award, not exceeding ten per centum on such part as may be released from the injunction."

Defendant in error gave its injunction bond in the penal sum of \$400 to plaintiffs in error, with the following condition, viz.:

The condition of the bond is that the West Chicago Street R. R. Co. shall "well and truly pay, or cause to be paid to the said Will F. Wanless and Charles O. Knudson, their executors, administrators, or assigns, all damages which may be sustained by the said defendants by reason of the wrongful issuing of such injunction, and also, all such costs and damages as shall be awarded against the said complainant in case the said injunction shall be dissolved; and also all money and costs due to the plaintiff in the judgment."

On a final hearing of the injunction case, the injunction was dissolved and the bill dismissed at complainant's costs, and thereupon this suit was instituted upon the bond against defendant in error. The case was tried by the court, a jury being waived by agreement. The court found the issues for the plaintiffs, and assessed the damages at \$20, on which judgment was rendered, to reverse which this writ of error is prosecuted.

The evidence would have justified a finding for the plaintiffs of \$150, but the court, at defendant's request, held the following proposition of law, viz.: "That the damages in this case be limited to an amount equal to ten per centum of the judgment enjoined, to wit, \$20," and refused to hold a counter proposition requested by plaintiffs to the effect that

their recovery of damages was not limited to such per centum of the judgment.

CHARLES O. SPENCER and CAMPBELL ALLISON, attorneys for plaintiffs in error.

EDMUND FURTHMANN, attorney for defendant in error.

MR. JUSTICE WINDES delivered the opinion of the court.

We are of opinion that the learned trial judge erred in holding defendant's proposition of law and in refusing the counter proposition of plaintiffs. Defendant in error saw fit to depart from the statute which required a bond conditioned to pay "such damages as may be awarded against the complainant in case the injunction is dissolved," and gave its bond conditioned to pay "all damages which may be sustained by said defendants by reason of the wrongful issuing of such injunction, and also such costs and damages as shall be awarded against the said complainant," etc.

The bond is a voluntary bond, given on a good consideration—to wit, the issuing of the injunction—and is binding on defendant in error as such. Had it confined itself to giving the bond required by the statute, and as ordered by the court, a more difficult question would arise. *Ballingall v. Carpenter*, 4 Scam. 306; *Pritchell v. People*, 6 Ill. 530; *Barnes v. Brookman*, 107 Ill. 322.

These cases are decisive of the case at bar, and the judgment will be reversed and the cause remanded.

Livingston T. Dickason et al. v. Augustus C. Mills.

1. **BILL OF EXCEPTIONS**—*Necessary to Preserve the Copy of the Account Sued On.*—A bill of exceptions is necessary to preserve, as a part of the record in the Appellate Court, the copy of the account sued on and required to be filed with the declaration.

2. **PRESUMPTIONS**—*In the Absence of a Bill of Exceptions.*—In the absence of a bill of exceptions showing to the contrary, the presumption is that the proceedings in the trial court were valid, must prevail.

Dickason v. Mills.

Debt, on appeal bond. Trial in the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Finding and judgment for plaintiff. Error by defendant. Heard in this court at the March term, 1898. Affirmed. Opinion filed July 21, 1898.

C. H. REMY, attorney for plaintiffs in error.

DEFREES, BRACE & RITTER, attorneys for defendant in error.

MR. JUSTICE SEARS delivered the opinion of the court.

Defendant in error filed his declaration in this suit in the Superior Court against plaintiffs in error and others. It is claimed that he failed to file with his declaration a copy of the instrument in writing, the appeal bond, which was the basis of his suit. Plaintiffs in error did not appear, and judgment by default was entered against them. The only error assigned and urged by counsel for plaintiffs in error is that the court erred in entering the default when, as it is claimed, no default could be properly entered because the declaration was without a copy of the instrument in writing sued on. The instrument was not set out *in haec verba*, and it is claimed in the brief of counsel that no copy was filed. There is, however, in the record here no bill of exceptions. The conditions are precisely similar to those obtaining in *Hippach v. First Natl. Bank*, 69 Ill. App. 32, affirmed in 169 Ill. 515, in which latter decision Mr. Justice Boggs, delivering the opinion of the court, said:

"The appellant insists a copy of the decree sued on was not filed with the declaration, nor ten days before the first day of the term, and for that reason urges it was error to enter judgment against him. The record in this court does not contain a bill of exceptions. A copy of the decree, if filed, would not have formed a part of the declaration. If not a part of the pleading it was not a part of the record proper in the cause. A bill of exceptions was necessary to preserve it as a part of the record in this court. As the record filed by the appellant in this court fails to disclose

that a copy of the decree was not filed, it is not apparent that error was committed in that respect. The presumption that the proceedings in the trial court were regular and valid must prevail."

We regard this decision as clearly governing the case here.

The judgment is affirmed.

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s97	688
77	124
s196s	58

Chicago League Ball Club v. The City of Chicago.

1. **PUBLIC USE—Private Property Taken For.**—Where the mayor of a city calls upon the governor for troops, and the troops are ordered to report to him, and he orders the police department to take possession of the premises of private persons upon which such troops are quartered, he acts in an official capacity in giving such orders.

2. **MILITIA—When Called Out for Duty.**—When a mayor exercises the power to call out militia to aid in suppressing riots, the latter are subject to the authority of the governor as commander-in-chief, and it is the governor's duty to order such military or naval forces to report to such civil officer as he shall designate, and to act in strict subordination to the civil authority.

3. **MAYORS—Of Cities Bound to See that the Laws and Ordinances are Executed.—Not Authorized to Create a Liability.**—The mayor of a city is bound to see that the laws and ordinances are faithfully executed. For this purpose he is given power when necessary to call on every male inhabitant of the city, and to call out the militia. He is not, however, specially authorized to incur a liability for the city, even in an emergency, except where provisions have been expressly made and authority conferred according to law. He is not authorized to take or damage private property for public use.

4. **SAME—Power in Emergencies.**—The extraordinary power to seize private property for public use, either by the police force, or by the State militia under the control of the mayor, and to impose liability upon the city for such seizure, can only be justified by the existence and the nature and character of the emergency.

5. **SAME—Powers in Emergencies—Sufficiency of the Emergency.**—The existence of a sufficient emergency is a question of fact to be determined from a consideration of all the circumstances. If these are such as at the time to afford reasonable ground for belief that the exercise of such extraordinary power is necessary to protect life or valuable property which otherwise would be destroyed, then an emergency will be said to exist.

6. **MUNICIPALITIES—Liability for Property Destroyed by Mobs.**—Ex-

cept where the statute so provides, a municipality is not liable for property destroyed by mobs.

7. *EMERGENCY—When it is Sufficient to Justify the Taking of Private Property for Public Use.*—An emergency, when shown to exist in time of war or of immediate and impending public danger, justifies the taking of private property for public use, and when so taken, the owner is entitled to compensation.

8. *SAME—What Must Govern the Decision of the Officer.*—In deciding upon this necessity, however, the state of the facts as they appear to the officer at the time he acts must govern his decision; for he must necessarily act upon the information of others as well as upon his own observation. And if with such information as he has a right to rely upon there is reasonable ground for believing that the peril is immediate and menacing, or the necessity urgent, he is justified in acting upon it; and the discovery afterward that it was false or erroneous will not make him a trespasser.

9. *PRIVATE RIGHTS—Must Give Way When—Compensation.*—Private rights, under such extreme and imperious circumstances, must give way for the time to the public good, but the government must make full restitution for the sacrifice. Such an obligation raises an implied promise on the part of the government to reimburse the owner for the use of his property and pay him a reasonable compensation.

10. *SAME—Subordinate to the Public Welfare.*—The rights of private property, inviolable as the law regards them, are yet subordinate to the higher demands of public welfare. Individuals or municipal officers may demolish a private house to prevent spreading of fire, and where the act is apparently or reasonably necessary, the municipality is not liable for buildings or property so damaged or destroyed, except where such liability has been created by an express provision of statute.

11. *PRIVATE PROPERTY—Taken for Public Use—Where No Compensation Can Be Recovered.*—There is a class of cases where private property is taken for public use, in which no compensation can be recovered; as, where it is subjected to restraints and burdens, in the exercise of those police powers which are necessary to the tranquillity of every well ordered community, and to the orderly existence of all governments.

12. *SAME—Destroyed in Military Operations.*—Where private property is destroyed in military operations of armies in the field, or by measures necessary for their safety and efficiency, no compensation can be claimed from the government; and this upon the principle *salus populi suprema est lex*.

13. *SAME—Pressed into the Public Service.*—Where private property is pressed into the public service, or is seized and appropriated to the public use, in an emergency, at a time of impending public danger, then the government is bound to make restitution to the owner.

14. *SAME—Principles Applied to States, etc.*—The principle upon which the general government is held liable for property so appropriated applies with like force to the appropriation of private property for pub-

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lic use by the government of the States, and municipal corporations are instrumentalities of the State for the convenient administration of government within their limits.

15. *MUNICIPALITIES—Liability for Private Property Taken for Public Use.*—It is not necessary in order to impose this liability upon a city, that the city council should convene, and by appropriate action direct that private property shall be so taken for the use of the city. In ordinary cases of emergency, such as can alone justify such taking, this would be impossible. It is enough that the executive officer charged with the duty of preserving peace and protecting property shall have directed the taking, he acts, in so doing, at his peril in determining the existence of a sufficient emergency.

16. *SAME—Obligation to Make Restitution.*—The obligation to make restitution for private property so taken, raises an implied promise on the part of the city to reimburse the owner and reasonably compensate him for the use thereof.

Assumpsit, for use and occupation. Trial in the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Finding and judgment for defendant. Appeal by plaintiff. Heard in the Branch Appellate Court of the First District, at the October term, 1897. Reversed and remanded. Opinion filed May 31, 1898.

STATEMENT.

This is an action in assumpsit, wherein appellant seeks to recover for the use and occupation of its ball park by the militia of the State, and for damages alleged to have been sustained by reason of injuries thereby done to the property, at the time of the riots connected with the so-called Pullman strikes.

Upon the morning of July 6, 1894, the mayor of Chicago called upon the governor for troops to aid in suppressing riots and other disorderly conduct, pursuant to Sec. 13, Art. 11, Chap. 24 of the Statutes. The request was immediately complied with, and the troops were ordered to report to the mayor, in accordance with the provisions of the act requiring military forces, when so ordered out, to report to such civil officer as the governor shall designate. (Sec. 400, *et seq.*, Div. 1, Chap. 38, Starr & Curtis' Stat.) Such of these troops as came from outside the city began to arrive about six o'clock in the evening, and it became necessary to determine where they should be located. Appellant's ball park is situated in the southern portion of the city, within

the vicinity of places where men were gathering in large numbers, from whom trouble was feared, if not anticipated. It was therefore suggested as a desirable location for the troops, and the mayor directed "the police department to take the park" for their use. In obedience to this order, a police inspector conducted a body of the militia to the place in question, and proceeded to take possession; and these were followed by others who were arriving at different times all through the night. There were present in conference with the mayor, at or about the time he issued this order to the police, certain members of the finance committee and of another special committee of the city council, the chief of police, corporation counsel, city comptroller, and perhaps others. After appellant discovered that its park was thus taken possession of, its representatives called upon the mayor, who promised them that the city should pay for its use. The premises were occupied by the troops as a camping ground for about twenty or twenty-one days. Testimony was introduced tending to show that the premises were injured more or less during this occupation.

Appellant seeks to recover, first, upon the verbal promise of the mayor, that the city should pay for the use of the park; second, upon an implied promise by reason of the alleged use and occupation of the premises in question by the city, and also compensation for actual damage to its property.

CHARLES M. SHERMAN, attorney for appellant.

The doctrine of implied municipal liability, says Mr. Chief Justice Field, in a case where the subject underwent very thorough examination, applies to cases where money or other property of a party is received under such circumstances, that the general law, independent of express contract, imposes the obligation upon the city to do justice with respect to the same. If the city obtain money of another by mistake, or without authority of law, it is her duty to refund it—not from any contract entered into by her on the subject, but from the general obligation to do justice, which

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binds all persons, whether natural or artificial. If the city obtain other property which does not belong to her, it is her duty to restore it; or if used by her, to render an equivalent to the true owner from the like general obligation; the law, which always intends justice, implies a promise. In reference to money or other property, it is not difficult to determine, in any particular case, whether a liability with respect to the same has attached to the city. The money must have gone into her treasury, or been appropriated by her; and when it is property other than money, it must have been used by her, or be under her control. 1 Dillon on Municipal Corporations (3d Ed.), Sec. 460.

The same law that protects my right of property against invasion by private individuals, must protect it from similar aggression on the part of municipal corporations. A city may elevate or depress its streets as it thinks proper, but if, in so doing, it turns a stream of mud and water upon the grounds and into the cellars of one of its citizens, or creates in his neighborhood a stagnant pond that brings disease upon his household, upon what ground of reason can it be insisted that the city should be excused from paying for the injuries it has directly wrought? *Nevins v. Peoria*, 41 Ill. 502-511.

We can not doubt that the latter is the sounder rule. We are unable to see why the property of an individual should be sacrificed for the public convenience without compensation. We do not think it sufficient to call it *damnum absque injuria*. We know our constitution was designed to prevent these wrongs. *Nevins v. Peoria*, 41 Ill. 502, 516.

It will not be denied this provision rests upon a great principle of right and justice which would, doubtless, be applied by courts in every proper case without constitutional sanction. With this clause of the constitution before us, we can not entertain a doubt of appellee's right to recover to the extent of the damage they have sustained. *City of Pekin v. Brereton*, 67 Ill. 477; see also *City of Aurora v. Gillett*, 56 Ill. 132; *City of Aurora v. Reed*, 57 Ill. 29; *City*

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of Pekin v. Winkel, 77 Ill. 56; City of Shawneetown v. Mason, 82 Ill. 337.

Where the property was destroyed by order of a municipality it was early held that the owner should be compensated for the loss which he sustained through the city's act. The justice of such a claim rests upon the great fundamental principle, which is now incorporated in our constitution, that private property shall not be taken for public use without just compensation. Mayor of New York v. Lord, 17 Wend. 285, at 292.

It is equally evident on the other hand, that if the private property of an individual, the whole or a part of which might otherwise have been saved to the owner, is taken or destroyed for the benefit of the public, or of the inhabitants of a particular county, city, town or other smaller section of the community, those for whose supposed benefit the sacrifice was made, ought, in equity and justice, to make good the loss which the individual has sustained for the common advantage of all. Bishop v. Mayor of Macon, 7 Ga. 200, 202.

No case can be cited in which it has been held that a municipal corporation can take the property of a loyal citizen and appropriate the same for public use without compensation. Even in time of war, if the property of a loyal citizen is taken for the purpose of providing food or shelter for the troops, or to prevent the enemy from getting possession of it, the government will compensate him for its loss. Vattel's Law of Nations, Book 3, Chap. 15, p. 402.

CHARLES S. THORNTON, corporation counsel, and THOMAS J. SUTHERLAND, attorneys for appellee.

Neither the mayor nor the council could bind the city as to payment for this pretended obligation.

Counsel refer to Chicago v. Shober et al., 6 Bradw. 560, 562-3. In this case the court held that under the terms of Chap. 24, R. S., conferring limited power upon the mayor, and the sections of that chapter, Nos. 63 and 92, no liability could be created by the mayor or any officer in the absence

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of a lawful ordinance expressly providing for it. See also *City v. Fire Ins. Co.*, 82 Ill. 45; *Smith v. McDowell*, 148 Ill. 62-3; *Field v. Barling*, 149 Ill. 566; *City v. Shepard*, 8 Ill. App. 610.

See also elaborate opinions of the courts in *Starkey v. Minneapolis*, 19 Minn. 203; *Thomas v. City of Richmond*, 12 Wall. (U. S.) 349, 354-6; *McDonald v. Mayor*, 68 N. Y. 23; *Dickenson v. Poughkeepsie*, 75 N. Y. 65, 73.

The mayor's office is purely executory and confined to the execution of the laws and ordinances. *Mut. Un. Tel. Co. v. Chicago*, 11 Biss. 543.

The city is but the instrumentality of the State. By the creation of the city the State does not relinquish its responsibility to preserve the peace in the city, provided the city can not do it; and the State discovers that fact when the mayor calls upon the governor for assistance. Then the State steps to the front and resumes its police powers, but it is entirely independent of the city's authority. *Harmon v. City*, 110 Ill. 400, 408-9.

But whether the occupation of the militia was by the city or the State, it was in the exercise of a public duty—the police duty—and hence, for any inconvenience or loss to plaintiff it was *damnum absque injuria*.

Counsel cite: *C. & N. W. R. R. Co. v. City of Chicago*, 140 Ill. 323; *C., B. & Q. R. R. Co. v. Chicago*, 166 U. S. 252-5; *Village of Carthage v. Frederick*, 122 N. Y. 268; *Sedgwick on Stat. and Const. Law*, 435; 1 *Dillon on Mun. Corp.* 212; *Arms v. City of Knoxville*, 32 Ill. App. 604, 609; *Tiedeman on Mun. Corp.*, Sec. 355, p. 667; *Harman v. Lynchburg*, 33 Gratt. 37; *Jones v. Richmond*, 18 Gratt. 517.

MR. JUSTICE FREEMAN, after making the foregoing statement, delivered the opinion of the court.

The question to be considered here is whether the city of Chicago became liable for the use and occupation of appellant's premises by the State troops. The Circuit Court held that the city did not use or occupy the park; that, inasmuch as the statute provides that the mayor shall have

power to call out the National Guard "to aid in suppressing riots and other disorderly conduct * * * *subject to the authority of the governor* as commander in chief of the militia," the mayor's authority ceased when the troops were thus called out; that thereafter they were under the command and control of the governor through their commissioned officers; that they were performing duty for the State, not for the city, and that any claim which appellant has should be made against the State; that as the city was not occupying the premises in question, the mayor could not, by his action nor by his oral promise, bind the municipality, and that the city is not liable.

While it is true that when the mayor exercises the power to call out the militia to aid in suppressing riots, the latter are subject to the authority of the governor as commander-in-chief, and it is the governor's "duty to order such military or naval forces as he may deem necessary to aid the civil authorities," yet it is provided that the forces so ordered out "shall report to such civil officer as the governor shall designate, and shall act in strict subordination to such civil authority." Rev. Stat., Secs. 67 and 68, Art. 10, Chap. 129; Const., Art. 2, Sec. 15.

In this case the troops were ordered to report to the mayor.

In the next section of the statute it is provided that all orders from civil officers to military or naval commanders "shall contain only the specific act to be performed," and that the manner of performing shall be left to the discretion of the officer. The scope of this discretion is undoubtedly that which belongs to the trained soldier as against a mere civilian, and is the discretion which is usually left in military operations to the officer in immediate charge. When in actual war a regiment or a brigade, or a division, is ordered to capture a battery, or force an enemy from a position, the disposition of the attacking force and the manner of performing the duty are ordinarily left to the officer in immediate command. There is all the more reason for this where the superior in command is a civilian,

without military experience. In the latter case the necessity of such a course is apparent. The statute therefore makes provision requiring it, and thus removes any possibility of dispute between the civil and the military officer as to the purely military management of the troops. But except as to this, the military are, by the statute, placed "in strict subordination" to the civil authority; in this case to the authority of the mayor, "in preserving the peace, quelling riots or executing the law." If, then, the mayor deemed it necessary that the troops should be located in a particular part of the city as a means of preserving peace or quelling riots there, it was within his power, under the statute, to so direct the officer in command, and it was the duty of the latter to obey. If opposition was encountered, then the manner of overcoming the opposition and seizing the location would rest entirely with the military officer as being wholly within his province. Subordination is defined as "the state of being under control of the government; subjection to rule." (Century Dic.) Subordination to the civil authority of the mayor, would seem to mean that the military forces are subject to his orders, and the next section directing what such orders shall contain, limits them to "the specific act to be performed." In this case the mayor directed a specific act to be performed, namely, that the troops occupy the ball park, and the order was obeyed. Circumstances might arise where the occupation of a certain position would be purely a military question, involving the manner in which an order to overcome opposition should be performed. But in this case, no such question arose. The order of the mayor was obeyed, and the troops in obeying it acted in proper subordination to authority conferred upon him by statute. The responsibility, therefore, was his, and he was acting in an official capacity, as much so as if he had ordered a part of the ordinary police force of the city to occupy the ground in question under the same circumstances; and the distinction sought to be made between an occupation by city employes and the militia, is, we think, unfounded.

It is said the militia were not subject to the orders of the city, nor in its pay; that the city was not liable for their food or equipment—then why liable for their lodging?

It is true, the militia were not subject to the orders of the city council, nor in the city's pay. But they were subject to the orders of the mayor, as has been indicated. The city was not liable for their food or equipment. But if the city had actually been compelled, because of an emergency, to furnish them with arms, or food and lodging, and had done so, procuring these things by proper authority, could it refuse to pay the contractor for the arms or the food or lodging so supplied? The city council, consisting of the mayor and aldermen (Rev. Stat., Chap. 24, Art. 3, Sec. 1), has power, expressly conferred by statute, "to prevent and suppress riots" (Idem, Art. V, par. 72), and can it not pass necessary ordinances, appropriate money for such corporate purpose, and provide for payment of debts and expenses so incurred? The statute also provides that whenever any real or personal property is destroyed or injured in consequence of any mob or riot, the city shall be liable for three-fourths of the damages thus sustained. (Chap. 38, Sec. 256a.) Can it be said that the city has not the power to protect itself against such liability, by incurring whatever expenditure may be necessary to prevent such destruction or injury? The statute, having thus made it the duty of the city to protect the property of its citizens, the performance of the duty is clearly a corporate purpose, for which money of the city can properly be appropriated, and liability incurred when the exigency so requires. Art. IX of the State Military Code provides for the pay of the officers and men of the militia, with transportation and necessary subsistence, "while under orders of the commander in chief or other proper authority." It may be that if the city had, in an emergency, furnished necessary subsistence, while the militia were thus acting under the "proper authority" of the mayor, it would have been entitled to be reimbursed by the State. But that question does not arise in this case, and we express no opinion in

relation thereto. The statute makes no provision for payment for camping grounds for the troops while engaged in the performance of the duty of "preserving the peace, quelling riots or executing the law" within a city. It seems clear, however, from what has been said, that if the city finds it necessary because a "tumult, riot or mob is threatened" or exists, to provide a camping place for troops ordered out to preserve the peace, it has the charter power and may properly make such provision and incur liability therefor.

It remains, however, to consider whether, by such act of the mayor, liability may be created against the city.

In this case the mayor directed private property to be taken for the public use, without obtaining the owner's consent. He subsequently promised the owner that the city should pay for the use of the premises, and make good any damage which might be done thereto.

The mayor is in duty bound to take care that the laws and ordinances are faithfully executed. For this purpose he is given power when necessary "to call on every male inhabitant of the city," and to call out the militia. He is not, however, specially authorized to incur liability for the city, even in an emergency, except where provision has been expressly made, and authority conferred according to law. He is nowhere authorized to take or damage private property for public use. Does the duty to keep the peace, to suppress riots and other disorderly conduct, and to take care that the laws and ordinances are faithfully executed, confer upon him in time of emergency, the extraordinary power to seize private property for public use, either by the police force or the State militia under his control, and to impose liability upon the city by such seizure, or by his promise to pay for the use of property so appropriated?

The exercise of such power can only be justified, if at all, by the existence and the nature and character of the emergency.

The existence of a sufficient emergency is no doubt to be determined from a consideration of all the circumstances.

If these are such as at the time to afford reasonable ground for belief that the exercise of such extraordinary power is necessary to protect life or valuable property which otherwise would be destroyed, then an emergency would be said to exist. If, for example, a body of the police or militia were surrounded and pressed by a mob, so that their only safety should lie in seizing a private building and barricading it, or if it should be necessary to seize such building in order to protect valuable property within, for the destruction of which the city would be liable, such situations would no doubt create an emergency, the existence of which would be a question of fact. In either of the cases supposed, the seizure might result in an attack by the mob, causing a large pecuniary damage or even partial destruction of the building so occupied. For such damage or destruction the statute of this State intends to provide a partial remedy, in an action against the city. Chap. 38, Sec. 256a. Such remedy exists, however, only by virtue of the statute, not by virtue of any common law liability. Except where the statute so provides, the municipality is not liable for property destroyed by mobs. Dillon on Municipal Corporations, Vol. 2, Sec. 959.

Where, however, as in this State, the city is by statute liable to an action for damages for property destroyed or injured in consequence of a mob, then the immediate danger of destruction such as might impose a great liability, would doubtless be regarded as creating an emergency. Emergencies do occasionally arise in the administration of government, State and municipal, for which the laws and ordinances make no provision. As is said in *Wiley v. Seattle*, 7 Wash. 576, such a case "demonstrates that there is, as in the nature of things there must be, such a thing as an emergency in the affairs of a municipal corporation, as well as in those of private corporations and individuals, for which neither laws, charters nor ordinances provide."

An emergency, when shown to exist in time of war or of immediate and impending public danger, justifies the taking of private property for public use, and when so taken the

owner is entitled to compensation. *Mitchell v. Harmony*, 19 U. S. (13 How.) 115; *United States v. Pacific Railroad*, 120 U. S. 227; *United States v. Russell*, 13 Wall. 623.

In *Mitchell v. Harmony*, *supra*, on page 427, it is said by Chief Justice Taney, "There are without doubt occasions in which private property may be lawfully taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with particular duty, may impress private property into the public service, or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser. But we are clearly of opinion, that in all these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist, before the taking can be justified. In deciding upon this necessity, however, the state of the facts as they appeared to the officer at the time he acted must govern the decision; for he must necessarily act upon the information of others as well as his own observation. And if with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing, or the necessity urgent, he is justified in acting upon it; and the discovery afterward that it was false or erroneous will not make him a trespasser. But it is not sufficient to show that he exercised an honest judgment, and took the property to promote the public service; he must show by proof the nature and character of the emergency, such as he had reasonable ground to believe it to be, and it is then for the jury to say whether it was so pressing as not to admit of delay, and the occasion such, according to the information upon which he acted, that

private rights must for the time give way to the common and public good."

In *U. S. v. Pacific Railroad*, *supra*, Mr. Justice Field uses the following language: "In what we have said as to the exemption of government from liability for private property injured or destroyed during war, by the operations of armies in the field, or by measures necessary for their safety and efficiency, we do not mean to include claims where property of loyal citizens is taken for the service of our armies, such as * * * buildings to be used as storehouses and places of deposit of war material, or to house soldiers or take care of the sick, or claims for supplies seized and appropriated. In such cases it has been the practice of the government to make compensation for the property taken. Its obligation to do so is supposed to rest upon the general principle of justice that compensation should be made where private property is taken for public use, although the seizure and appropriation of private property under such circumstances by the military authorities may not be within the terms of the constitutional clause."

In *U. S. v. Russell*, 13 Wall. *supra*, Justice Clifford says: "Extraordinary and unforeseen occasions arise, however, beyond all doubt, in cases of extreme necessity, in time of war or of immediate and impending public danger, in which private property may be impressed into the public service, or may be seized and appropriated to the public use or may even be destroyed without the consent of the owner. * * * Exigencies of the kind do arise in time of war or impending public danger, but it is the emergency, as was said by a great magistrate, that gives the right, and it is clear that the emergency must be shown to exist before the taking can be justified. Such a justification may be shown, and where shown the rule is well settled that the officer taking private property for such a purpose, if the emergency is fully proved, is not a trespasser, and that the government is bound to make full compensation to the owner." And it is further said "that the taking of such property under such circumstances creates an obligation on

the part of the government to reimburse the owner to the full value of the service. Private rights, under such extreme and imperious circumstances must give way for the time to the public good, but the government must make full restitution for the sacrifice." The court then holds that such an obligation raises an implied promise on the part of the government to reimburse the owner for the use of his property and pay a reasonable compensation therefor.

There is a class of cases where property is taken for public use, in which no compensation can be recovered. This is true where it is subjected to restraints and burdens in "the exercise of those police powers which are necessary to the tranquillity of every well-ordered community," and to the orderly existence of all governments. Sedgwick on Stat. and Const. Law, 435; Dillon on Municipal Corp., Vol. 1, p. 212 (4th Ed).

"The rights of private property, inviolable as the law regards them, are yet subordinate to the higher demands of the public welfare." Dillon, Vol. 2, Sec. 955. Upon this principle it has been said that individuals or municipal officers may demolish a private house to prevent spreading of fire, and where the act is apparently and reasonably necessary, would not be responsible to the owner therefor. The municipality is not liable for buildings or property so damaged or destroyed, except where such liability has been created by an express provision of statute. In cases, also, where private property is destroyed in military operation of armies in the field or by measures necessary for their safety and efficiency, no compensation can be claimed from the government; and this upon the principle *salus populi suprema est lex*.

But where private property is pressed into the public service, or is seized and appropriated to the public use, in an emergency at a time of impending public danger, then the government is bound to make restitution to the owner.

The principle upon which, in the cases cited, the general government is held liable for property so appropriated, applies with like force to the appropriation of private prop-

erty for public use by the government of the State and the city. "Municipal corporations are instrumentalities of the State for the convenient administration of government within their limits." Dillon, *Municipal Corp.*, Vol. 1, Sec. 66; *People v. Village of Chapin*, 48 Ill. App. 643; *Louisiana v. Mayor*, 109 U. S. 285.

They are created and possess the powers conferred by statute. In this State the power has been expressly conferred upon the city government to prevent and suppress riots (Rev. Stat., Chap. 24, Art. V, par. 72), and when in the performance of the duty, and the exercise of the power thus conferred by law, an emergency arises sufficient, because of impending public danger, to justify impressing private property into the public service, then the taking of such property under such circumstances by the officer of the city charged with the duty of enforcing the law, creates an obligation on the part of the municipality to reimburse the owner for the value of the service or for any loss or damage thereby sustained, upon the general principle of justice requiring compensation for private property taken or damaged for public use. This principle is embodied in the constitution of the State, and enforced by statute. No reason is perceived why it should not be applied to the municipality, even though the circumstances of the taking are not in accordance with the method prescribed by law, and although ordinarily "the provision for compensation, except in extreme cases, is a condition precedent annexed to the right of the government to deprive the owner of his property without his consent." U. S. v. Russell, *supra*.

This obligation is recognized by the Supreme Court of this State. *City of Pekin v. Brereton*, 67 Ill. 477; *City of Elgin v. Eaton*, 83 Ill. 535; *Nevins v. City of Peoria*, 41 Ill. 409.

In *City of Elgin v. Eaton*, *supra*, it was held that where private property was damaged by an improvement being made by a municipal corporation for public use, the owner is entitled to compensation therefor, under the provision in the State constitution, that private property shall not be

taken or damaged for public use without just compensation.

In *Nevins v. City of Peoria*, *supra*, on page 409, it is said: "Neither State nor municipal government can take private property for public use without due compensation, and this benign provision of our constitution is to be applied by the courts whenever the property of the citizen is invaded, and without reference to the degree." The same principle is applied also in *Bishop v. Mayor of Macon*, 7 Ga. 200, where it is held that when private property has been destroyed for the benefit of the city, the latter "ought in equity and justice to make good the loss which the individual has sustained for the common advantage of all. And there is an implied assumpsit or undertaking on the part of the public that adequate remuneration shall be made."

It is, as we have said, only the emergency, too urgent to admit of delay that can justify the taking of private property for the benefit of the city in extreme cases without previous provision for compensation, and thus create obligation on the part of the city to reimburse the owner. "If the public necessity in fact exists, the act is lawful." *Mayor of New York v. Lord*, 17 Wendell, 285 (292).

The obligation is not created, nor is the liability increased or diminished by the subsequent promise of the officer, civil or military, who impresses the property into the public service, that the government will pay for its use. Hence no liability was created against the appellee by the mayor's promise that the city would pay for the use of or damage to the premises, and it is not necessary to further consider the claim of appellant's counsel that the promise by the mayor that the city should pay a reasonable rental for the premises occupied by his direction, but without express authority conferred on him to make such agreement or to occupy such premises, binds the municipality.

It is not essential, in order to impose this liability upon the city, that the city council should convene, and by appropriate action direct that private property shall be so taken for the use of the city. In ordinary cases of emergency,

such as can alone justify such taking, this would be impossible. It is enough that the executive officer charged with the duty of preserving peace and protecting property shall have directed the taking. He acts in so doing at his peril. If the circumstances are not such as at the time to afford reasonable ground for belief that the exercise of such extraordinary power is necessary by reason of the emergency, then he is a trespasser and liable as such. Otherwise the city is under obligation to compensate the owner.

The obligation to make restitution for private property so taken, raises an implied promise on the part of the city to reimburse the owner and reasonably compensate him for the use thereof. *Bishop v. Mayor of Macon, supra.*

"Beyond doubt such an obligation raises an implied promise," as was said in *United States v. Russell, supra*, on the part of the municipality for the protection or benefit of which it has been taken, "to reimburse the owner for the use" of his property. "*Indebitatus assumpsit*" says that court, "is founded upon what the law terms an implied promise on the part of the defendant to pay what, in good conscience, he is bound to pay to the plaintiff, but the law will not imply a promise to pay unless some duty creates such an obligation, and it will never sustain any such implication in a case where the act of payment would be contrary to duty or contrary to law."

As there must be another trial, we refrain from a discussion of the evidence. The existence of an emergency, such as to justify the temporary occupation of the premises in controversy, is to be determined from the evidence. If such emergency existed, appellant is entitled to be reasonably compensated for the use of the property and for actual damage, if any, thereby sustained. Otherwise the occupation was a mere trespass for which appellee is not liable.

For the reasons indicated the judgment will be reversed and the cause remanded.

**West Chicago Street Railroad Co. v. Joseph Johnson, by
His Next Friend.**

1. **COMMON CARRIERS—Of Passengers, When Not Relieved of Care, etc.**—Intramural carriers of passengers who invite the overcrowding of their cars for purposes of gain to themselves, are not to be relieved from the high degree of care the law requires of them, because one of their passengers lightly oversteps the limit of some rule or regulation, or resumes a position which for a temporary accommodation to the carrier he withdraws from, unless he be so warned of its dangers as to make it clear that he knew them and assumed the risk.

2. **PRACTICE—Next Friend—Waiver.**—If the defendant appear and plead, it is then too late to question the authority of the *prochein ami*, and the recital in the suit that the infant is suing by his next friend, is taken as conclusive that the order authorizing him to do so has been made.

3. **DAMAGES—\$3,000 Not Excessive.**—A young man sued for personal injuries received by him while he was a passenger on board a cable car, and which were occasioned by the sudden flying back of an iron brake-lever, the end of the handle of which struck him on the right leg inflicting a wound three inches wide, extending from the knee on the outside of the right leg upwards for eight inches, through the tissues to the bone, the muscle lying in the track of the wound being cut. "The function of the muscle being to strengthen the leg as it is used in walking, he could not walk on his leg without using the muscle unless he held the leg stiff." It was held that \$3,000 was not excessive.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding; verdict and judgment for plaintiff. Appeal by defendant. Heard in the Branch Appellate Court of the First District, at the March term, 1898. Affirmed. Opinion filed May 31, 1898.

ALEXANDER SULLIVAN, attorney for appellant; E. J. McARDLE, of counsel.

JOHN F. WATERS, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD delivered the opinion of the court.

This is an appeal from a judgment for three thousand

dollars recovered by appellee in an action for personal injuries. The injuries complained of were received by appellee while he was a passenger on board a cable car owned and operated by appellant, and were occasioned by the sudden flying back of an iron brake-lever, the end of the handle of which struck him on the right leg, inflicting a wound described by the surgeon who attended him, as "extending from the knee on the outside of the right leg upwards for eight inches, and extending through the tissues to the bone all the way, excepting the upper two inches; I suppose this wound was three inches wide. * * * The muscle lying in the track of the wound was cut. * * * The function of that muscle, with two others on the anterior surface of the leg, is to strengthen the leg—extend it. * * * It is used in walking. A man could not walk on his leg without using that muscle unless he held his leg stiff. * * * There was no injury to the knee joint; * * * there was no bone injured."

The car was a combination passenger and grip car, partly divided by an aisle, in which ordinarily no one but the gripman stands and the levers controlling the car are operated.

It was a rainy morning when the appellee boarded the car to come down town to his work, and there was sufficient evidence to justify the jury in finding that the train was so crowded as to warrant the appellee in pushing past other passengers into the gripman's aisle, where it appears it was not unusual for passengers to stand when riding on similar cars operated by appellant under like circumstances. Ordinarily there might not be any danger to a passenger so riding. But under conditions of defective grip machinery, track or slot, one or both of which apparently existed in this instance, whereby the grip machinery should be suddenly interfered with, and the grip lever suddenly loosened and thrown back with great force, it would be a very hazardous place in which to ride.

There was evidence tending to show that at the time in question several other persons were standing in the aisle, but appellee appears to have stood nearest to the gripman.

The accident happened after appellee had ridden in that position about two blocks, and there was conflicting testimony as to whether the gripman told appellee to move back, and motioned or pushed him back from the place where he was standing, but we fail to see any evidence that appellee was in any way warned that his position was one of danger, or more than temporarily inconvenient to the gripman, unless it may be said that his own senses were sufficient to give him such notice or knowledge.

Upon the facts of the case we have no hesitation in saying that they warranted the jury in finding negligence by appellant and due care on the part of appellee.

Of five instructions given at the request of appellee, two are complained of, but we think the objections to them are not well founded.

It is urged that appellant's twenty-fourth instruction was improperly refused. It was as follows:

"The jury are instructed that if they believe, from the evidence, that the defendant's gripman who was operating the grip car in question, requested the plaintiff to leave the position he was in, at or just before the time of the accident and the injury herein complained of; and if the jury also believe from the evidence that the plaintiff refused to do so, or at first did so and then went back to the same position when the gripman's back was turned; and if the jury also believe that the plaintiff's own conduct contributed in any way to bring about the accident to himself, which resulted in the injuries herein complained of, then the plaintiff can not recover and the verdict should be, not guilty."

However correct the general propositions of law may be that are so announced, as applied to the evidence in this case the instruction falls short and was properly refused.

There was evidence tending to prove that the cars were so crowded that appellee had no other place to stand. Under such circumstances, appellee having been invited by the appellant to become a passenger by the stopping of the train to receive him, and having in fact become a passenger, the question of whether the position he occupied was one

of necessity, and was consistent with the exercise of proper caution and care for himself, under the circumstances, were elements that should not have been omitted from the instruction.

Intramural carriers of passengers who invite the overcrowding of their cars for purposes of gain to themselves, are not to be relieved from the high degree of care the law requires of them, because one of their passengers lightly oversteps the limit of some rule or regulation, or resumes a position which, for a temporary accommodation to the carrier he withdraws from, unless at least he be so warned of its dangers as to make it clear that he knew them and assumed the risk. Here the jury had a right from the evidence to find that the request by the gripman, if he made one, for appellee to leave his position, was for a temporary accommodation to himself, and not because of any danger pointed out to appellee.

There were numerous objections by counsel for appellant to the argument to the jury by appellee's counsel, but the court made no ruling except as to one, and no exception was preserved to that ruling. We need say no more about the argued error in that regard.

The next contention by appellant is that appellee, being an infant, his suit by his next friend can not be maintained, because the record shows no previous authority or appointment by any court of his next friend, and no bond for costs was filed, as required by statute. Ch. 64, Sec. 18, Rev. Stat.

Commenting upon the ancient practice of appointing a *prochein ami*, it was said in *Chudleigh v. C. R. I. & P. Ry. Co.*, 51 Ill. App. 491: "This practice has fallen into disuse, and now if the defendant appear and plead, it is then too late to question the authority of the *prochein ami*, and the recital in the suit that the infant is suing by his next friend, is taken as conclusive that the order has been made. See also *Kingsbury v. Buckner*, 134 U. S. 650.

The question of excessiveness of damages remains to be considered.

The verdict of the jury was for \$4,000, which was remitted to \$3,000 in the court below.

The amount of damages in cases of this character is always a delicate question, and is often a difficult one.

The evidence shows most clearly that the injury was a painful one, and it was a long time—four or five months—before appellee could get around without attention and the aid of a crutch or cane.

But, according to appellee's own testimony, the main permanent injury is confined to a weakness in the leg and a dragging of his foot if he walks a long distance, and a "tired feeling" in the foot when walking or standing much. His earning capacity does not seem to have been interfered with, except while he was in the period of recuperation, and if it were an original proposition, it might better correspond with our understanding of the rule that compensation is all that the law allows in such cases, if the judgment had been for less.

Still, it being a case in which there was a clear right of recovery, we do not feel called upon to say the judgment was for too much, and it will be affirmed.

Mr. Justice HORTON does not concur in the foregoing opinion.

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**Traders Safe & Trust Co. and Imperial Building Co. v.
Reuben Calow.**

1. *APPEAL—Bond Must be Filed in the Time Fixed—Jurisdictional.*—The filing of an appeal bond within the time fixed by the court allowing the appeal, is jurisdictional.

2. *WAIVER—Of the Right to Move to Dismiss an Appeal.*—The right to move to have an appeal dismissed because the appeal bond was not filed in time is not waived by mere delay, when the motion goes to the jurisdiction of the court.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding.

Traders Safe & Trust Co. v. Calow.

Verdict and judgment for plaintiff. Appeal by defendant. Heard in the Branch Appellate Court of the First District, at the March term, 1898. Appeal dismissed. Opinion filed May 31, 1898.

JOHN A. POST and CHARLES B. STAFFORD, attorneys for appellants.

C. C. BOWERSOCK and C. C. STILLWELL, attorneys for appellee; L. M. AOKLEY, of counsel.

MR. PRESIDING JUSTICE SHEPARD delivered the opinion of the court.

The judgment shown by the record of this cause was rendered in an action brought to recover damages for personal injuries alleged to have been suffered by the appellee by reason of the negligence of the appellants in respect of matters set forth in the declaration.

From such examination of the record as we made before our attention was directed to a pending motion, continued over from the last term, that challenges the jurisdiction of this court, we would probably affirm the judgment of the trial court.

The motion referred to is to dismiss the appeal because the appeal bond was not filed within the time limited by the order allowing an appeal, and no extension of the time for filing the same had been ever granted.

The judgment was entered on the 22d day of May, 1897, and at the same time an appeal was prayed and allowed, upon condition that the appellants should file their appeal bond within thirty days from that date.

The appeal bond was neither approved by the court nor filed until June 23, 1897, which was thirty-two days after the appeal was allowed, and was two days too late. Sec. 68 (old No. 67), Practice Act; *Wormley v. Wormley*, 96 Ill. 129; *Case v. Spiegel*, 44 Ill. App. 588, and cases cited; *Gorski v. John Featherstone's Sons*, 55 Ill. App. 368.

Counsel for appellants argue that the motion to dismiss was not made in apt time; that it was not made until after the time when appellee was required to appear in this court,

and was made during the period of an extension of ten days' time for filing his briefs, allowed to him as a matter of grace by stipulation of appellants. If the suggestion has any force as applied to other circumstances, it has none as applied to a motion affecting the jurisdiction of this court.

Furthermore, appellants insist that the bond was filed in due time, and in order that we may certainly not do an injustice to counsel in stating their contention in such behalf, we quote their whole argument, or statement, upon the point. They say:

"In regard to the bond, it shows upon its face that it was approved by counsel of appellee. It is also the rule that the first day on which the appeal was granted does not count in estimating the time, and that counsel have until ten o'clock in the morning following the last day of the term (time) allowed in which to file the bond. The correct computation will show in this case it was filed in due time."

There is no such "rule" of computation of time that we are acquainted with, and counsel do not enlighten us as to where a statement of it may be found.

It is true that the bond shows upon the margin of its face the letters "O. K.," followed by the signature of attorneys for the plaintiff, but it does not appear when such indorsement was made, and it can hardly be said to have any effect except to signify the concurrence by counsel in the form of the bond and the sufficiency of the sureties.

We omit mention of other pending motions made by the appellee going to prevent a consideration of the case upon its merits, for it is sufficient to hold, that because of a failure to file an appeal bond within the time limited by the order allowing the appeal, and no extension of such time having been made, and a motion to dismiss being interposed, the appeal must be dismissed, which is accordingly done.

Appeal dismissed.

Louis Kistler v. Walter H. Wilson and John E. Jenkins.

1. **LANDLORD AND TENANT—Occupation of Premises after Eviction.**—A tenant can not claim a constructive eviction and continue the use of the demised premises after the commission of the acts which he claims would justify him in abandoning them.

2. **SAME—What Constitutes an Eviction.**—In order to constitute a constructive eviction, the acts of the landlord must be such as to clearly indicate an intention on his part that the tenant shall no longer continue to hold the premises. Such act must be of a grave and permanent character and done "for the purpose of depriving the tenant of the enjoyment of the demised premises."

3. **SAME—Noise, etc., from an Elevated Railroad.**—The fact that the owner of leased premises consents to the erection of an elevated railroad along the street in front of the same, and that the operation of such railroad seriously discommodates the tenant and interferes with the transaction of his business does not constitute such an eviction as will justify the tenant in abandoning the premises.

Action for Rent.—Trial in the County Court on appeal from a justice of the peace; the Hon. D. L. JONES, Judge, presiding. Finding and judgment for plaintiff. Appeal by defendant. Heard in this court at the March term, 1898. Affirmed. Opinion filed April 18, 1898.

JOHN W. BYAM, attorney for appellant.

If a tenant is evicted at any time before the rent becomes due, the rent is not payable at all. Taylor's Landlord and Tenant, 389; 3 Kent's Com. 464; Wade v. Halligan, 16 Ill. 507; Hayner v. Smith, 63 Ill. 433; Press Association v. Brooks, 30 Ill. App. 114.

If the landlord does any act which renders the lease unavailing to the tenant, he is thereby discharged from the conditions of the lease and may abandon it. Halligan v. Wade, 21 Ill. 470; Anderson v. Insurance Co., 21 Ill. 601; Leadbeater v. Roth, 25 Ill. 587.

It is true that the tenant has his action for a breach of the covenants of the landlord, but he may also abandon the premises, as the landlord by his acts has terminated the lease. Wright v. Lattin, 38 Ill. 296; Lynch v. Baldwin, 69 Ill. 212; Dexter v. Manley, 4 Cush. 14; Field v. Herrick, 10

Bradw. 591; *Smith v. Wise*, 58 Ill. 141; *Taylor's Landlord and Tenant*, 377.

The tenant must abandon possession or pay rent. *Cram v. Dresser*, 2 Sand. 120; *Rogers v. Ostrom*, 35 Barb. 523; *Cohen v. Dupont*, 1 Sand. 260; *Elliott v. Aikens*, 45 N. H. 35; *Mortimer v. Brunner*, 6 Bosw. 653; *Academy of Music v. Hackett*, 2 Hilt. 217; *Edgerton v. Page*, 20 N. Y. 281.

If the acts of the landlord are such as to merely tend to diminish the beneficial enjoyment of the premises, the tenant is still bound for the rent if he continues to occupy the premises; but if he abandons the premises, he is not bound to pay rent. *Skally v. Shute*, 132 Mass. 367; *Chicago Legal News v. Browne*, 103 Ill. 317; *Edgerton v. Page*, 20 N. Y. 284; *Halligan v. Wade*, 21 Ill. 470; *Leadbeater v. Roth*, 25 Ill. 587.

WM. E. HUGHES, attorney for appellees.

The only covenant implied in a lease is that for quiet enjoyment. This only means the lessor shall have such title to the premises as will enable him to give a good, unencumbered lease for the term demised. It implies no warranty against the acts of strangers. It confers on the lessee a right to enter upon the premises and nothing more. *Gazzolo v. Chambers*, 73 Ill. 75.

When a lease is in the ordinary form, and binding the lessee to pay the lessor rent during the whole term, the rent continues, no matter what may befall the premises. *Peck v. Ledwidge*, 25 Ill. 109.

An eviction is more than a mere trespass by the landlord. It must be something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the premises. *Hayner v. Smith*, 63 Ill. 430; *Lynch v. Baldwin*, 69 Ill. 210; *Morris v. Tilson*, 81 Ill. 607.

From an express covenant to pay rent nothing releases a tenant except eviction by landlord or that the tenant was otherwise legally entitled to quit possession, or that the landlord has accepted another person as tenant. *Taylor's Landlord and Tenant*, 8th Ed., Vol. 1, Sec. 372.

Kistler v. Wilson.

MR. JUSTICE WINDERS delivered the opinion of the court.

Appellees made appellant a lease of three rooms to be occupied for business offices, in the Northern office building at LaSalle and Lake streets, Chicago, from May 1, 1894, to April 30, 1897. Appellant occupied the rooms as law offices from May 1, 1894, to February 22, 1896, when he vacated them. This suit was brought by appellees before a justice of the peace for the rent of March and April, 1896, and janitor's fees under the lease, and recovered judgment. An appeal was taken to the County Court of Cook County, where there was another trial before the court, a jury having been waived, and appellees recovered a judgment for \$177.46, from which appellant has appealed. The defense made below was that appellant was evicted from his offices by the construction and operation of the Lake Street Elevated Railway in Lake street, and in front of the offices; that appellees gave their consent to the construction and operation of the railway on Lake street, which ruined the offices for the purpose of conducting a law business therein, because of the noise, dust, soot, smoke, steam and vibration of the building in which appellant's offices were located, resulting from the construction and operation of the railway. Counsel for appellant, in his brief says, that if the holding of the trial court on the question of eviction by reason of the disturbance to appellant's occupancy of the leased premises by the construction and operation of the elevated railway is the law, then "the plaintiffs should have recovered," and in the oral argument this was also stated to be the question for decision. We therefore do not consider in this opinion the other questions argued in the briefs, assuming that they are waived, and being of opinion that none of the contentions made would justify a reversal of the judgment.

It appears from the evidence that one of the appellees, after the making of the lease to appellant, was active in securing consent of many different persons to the construction of the elevated railway on Lake street; also gave his own consent to such construction, and did all he could to

get the elevated railway built on Lake street. The evidence offered for appellant also tends strongly to show that the noise resulting from the construction of the railway, and also the noise, dust, soot, smoke, steam, and the vibration of the building in which appellant's offices were, caused by the operation of the railway, seriously discommoded appellant and interfered with the transaction of his business while he remained in his offices. The evidence was such that, if it can be said that appellees are in law answerable to appellant for the manner in which the railway was operated in Lake street, then there was a question of fact for the determination of the court as to whether the manner of such operation, in its effect upon the use and occupancy of the leased premises by appellant, amounted to an eviction.

Appellant asked the trial court to hold, but it refused, all of the following propositions of law, to wit :

"The court finds, as a matter of law, that if the plaintiffs consented to the building of the elevated road on Lake street, then if the running and operating of the said road by noise or otherwise so interfered with the defendants that they were prevented from conducting their business in the offices rented by them of the plaintiffs to the full extent that they could conduct said business but for the operating of the said road, and if such disturbance continued from the completion of said road until the premises were abandoned by the defendants, and if said defendants abandoned said premises and surrendered them to the plaintiffs by reason of said disturbance, such disturbance amounting in law to a constructive eviction of the defendants by the landlord, and the defendants were justified in abandoning the same, then the plaintiffs can not recover.

"The court finds, as a matter of law, that if the plaintiffs in this case gave their voluntary consent for the construction of the elevated road on Lake street that passed the premises leased by the defendants of the plaintiffs, then all of the annoyance and disturbance of the building and the running of the said road necessarily caused the defendants,

would be the same as if voluntarily and personally caused by the plaintiffs.

“The court finds, as a matter of law, that if the plaintiffs gave their consent that the elevated road on Lake street might be built, then if the operating of said road by smoke or steam so darkened the windows of the offices rented by the defendants of the plaintiffs, that the defendants were by reason thereof hindered and prevented from transacting their business in said offices as fully as they might otherwise have done, and that said obstruction continued and existed at the time said defendants abandoned said offices, and said offices were abandoned by reason of said obstruction, then the defendants were justified in abandoning said premises, and the plaintiffs can not recover.

“The court finds, as a matter of law, that in every lease, whether so expressed in the instrument or not, there is a covenant on the part of the landlord for quiet enjoyment by the tenant, and if the evidence in this case shows that the plaintiffs breached or failed to keep said covenant, then and in that event the plaintiffs are not entitled to recover.”

It is evident that if the above propositions state the law which should have governed the trial court in the determination of this case, then it was decided upon an erroneous view, and the judgment should be reversed; but if they are not the law as applicable to the facts, then there being no other error, it should be affirmed.

The question is, were appellees, under the facts stated, answerable to appellant for the manner of construction and operation of the elevated railway.

That they are not answerable for the manner of construction to the extent that appellant may now claim an eviction by reason of noise and disturbance caused from construction, is clear, because he remained in his offices long after the railway was constructed and had been in operation. He must have abandoned the leased premises because of the construction of the railway before he can claim it as an eviction. He can not claim a constructive eviction and continue the use of the demised premises after the commis-

sion of the acts which he claims would justify him in abandoning them. *Keating v. Springer*, 146 Ill. 495, and cases cited; *Barrett v. Boddie*, 158 Ill. 484.

In order to constitute a constructive eviction, such as is claimed in the case at bar, the acts of the landlord must be such as to "clearly indicate an intention on the part of the landlord that the tenant shall no longer continue to hold the premises." The act of the landlord to constitute an eviction must be of a grave and permanent character, and done "for the purpose and with the intention of depriving the tenant of the enjoyment of the demised premises." *Hayner v. Smith*, 63 Ill. 430; *Lynch v. Baldwin*, 69 Ill. 210; *Morris v. Tillson*, 81 Ill. 607-23; *Keating case, supra*; *Barrett case, supra*.

It can not be said, from anything appearing in this record, that the acts of appellees in giving their consent to the construction of the railway in Lake street, clearly indicated an intention on their part that appellant should no longer continue to occupy his offices, nor that the giving of such consent was for the purpose or with the intent of depriving appellant of the full enjoyment of his offices. It is nowhere shown that appellees' consent to the building of the railway was necessary to or was the cause of its construction. It might have been built by the consent of the majority of the owners of frontage on the street, and against the most vigorous protests of appellees. But the fact appears that owners were glad to give their consent, believing that the railway would benefit the property. If they were honest in this belief, and it should be presumed that they were desirous of increasing the value of their property, it could scarcely be said that it would be a natural and reasonable result from the construction and operation of the railway, that it would increase the value of property and at the same time create such a disturbance as to render appellant's offices practically useless.

It certainly would not follow, so far as appears from any evidence in this record, that by the acts of appellees in giving their consent to the building of the railway, they thereby

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intended or anticipated that the railway would be so operated as to materially disturb appellant in the use and enjoyment of his offices, and they should not be held to be answerable for the acts of the railway company, unless they could have reasonably expected, in the usual and ordinary course of events, that such acts would have that effect. Their intent that their consent should have that effect should appear before they would be answerable.

Appellees then not being responsible for any of the results which appellant claims were caused by the operation of the railway, there was no error in the trial court refusing the propositions of law above stated, and in rendering judgment as it did.

The judgment is affirmed.

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85	556

American Merchants Manufacturing Co. v. Gustav A. Kantrowitz and Isaac H. Foreman.

1. **CONSIDERATION**—*Where a Court Will Not Inquire into it.*—If an article or a right which may be the subject of valid transfer, be fairly sold and purchased for a stipulated consideration, a court will not annul the bargain because the article or right possesses little or no value.

2. **SAME**—*In Reference to Patent Rights.*—So long as the validity of a patent stands, evidence as to whether it is really valuable or useful, in either a less or greater degree, is not admissible for the purpose of inquiring into the adequacy of the consideration of a contract based upon such patent.

3. **CONTRACTS**—*Construction of.*—Words employed in contracts should be construed in accordance with their plain, natural and obvious meaning.

4. **PRACTICE**—*Questions of "Premature Suit."*—*How Raised by Plea.*—The question whether an action is premature can not be raised by a plea of the general issue. It must be raised by a plea in abatement.

Assumpsit, for royalties on patents. Trial in the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Finding and judgment for plaintiff. Appeal by defendant. Heard in the Branch Appellate Court of the First District, at the March term, 1898. Affirmed. Opinion filed May 31, 1898.

ASAY & CLARE, attorneys for appellant.

FELSENTHAL & D'ANCONA, attorneys for appellees.

MR. PRESIDING JUSTICE SHEPARD delivered the opinion of the court.

Appellees being the owners of certain patented inventions adapted to the driving mechanism of velocipedes, entered into a contract with appellant giving to appellant an exclusive license to manufacture and sell the articles covered by said patents.

We adopt such paragraphs of the synopsis made in the brief for appellant, of the agreement that was entered into by the parties, as is needed to an understanding of the questions in controversy. They are as follows:

"First. That appellant shall pay as royalty to appellees one dollar for each article sold by appellant.

Second. That appellant shall sell at least 1,000 of the articles in each and every year during the continuance of this license; the first year to begin on April 1, 1896, and annually on the first days of April thereafter.

Third. That payment of such royalties shall be made to appellees in the following manner:

'On the first day of each and every month after April, 1896, appellant shall furnish to appellees a written verified statement, showing the number of articles sold by it during the preceding month, provided that the amount so to be paid by appellant shall in no instance be less than eighty dollars; and appellant shall, at the same time, pay to appellees the royalties that are shown to be due them; provided that nothing herein shall release appellant from its obligation to pay appellees royalties on at least 1,000 of said articles in each and every year during the life of this agreement.'

Eleventh. Provides, in regard to one of the patents or applications being held invalid, that the contract shall still be binding as to the other patent; and further provides:

'That appellant shall nevertheless manufacture or cause to be manufactured and sold articles covered in the other patent and shall pay to appellees royalties on at least 1,000 of such articles in each year, during the life of the agreement.'"

The agreement was dated February 24, 1896, and it was provided that the first year of the term of the license and agreement should not begin until April 1, 1896.

Suit was brought by appellees to the January term, 1897, and at the trial it was proved that no payments had been made on the contract for the months of June, July, August, September, October, November and December, 1896, and that \$385.83, including interest, was due to appellees under the contract, upon the basis that two-thirds of \$80 per month for those months was what appellees were entitled to.

By way of defense the appellant offered to prove that the patented invention mentioned in the agreement sued on was of little value, but such line of proof was excluded by the trial judge; and it was next insisted that the action was prematurely brought, in that no cause of action arose on the agreement until the expiration of one year from April 1, 1896, but the trial judge held otherwise.

It was then admitted by the plaintiffs (appellants) "that the defendant sold not to exceed twenty-five of the devices covered by said letters patent of the United States, and the royalty on said devices so sold by said defendant has been paid to said plaintiffs by said defendant."

And there was no other evidence on either side, except the contract itself.

The judgment for \$385.83, here appealed from, was thereupon entered in favor of the appellees.

The questions thus raised are but two, and they are questions of law.

The first one goes to the failure of consideration, invoked by the refusal of the trial court to admit offered proof that the invention mentioned in the agreement sued on was of little value; and it is conceded that in connection with this point we should consider the admission made by appellees that the appellant sold not to exceed twenty-five of the patented devices, and that the royalty on them was paid to appellees.

It must be kept in mind that there is here involved no question of title, no fraud, no warranty, express or implied,

no mistake as to facts, but merely a question of value—as to which, for aught that appears in this record, each party was possessed of equal information—and in such cases the parties are bound by their contracts. If an article, or a right which may be the subject of valid transfer, be fairly sold and purchased for a stipulated consideration, a court may not annul the bargain because the thing or right possesses little or no value. If that could be done, it would be permitted to the court in every case to inquire into the value of the subject of sale, and to adjust its judgment accordingly, as a substitute for that of the parties, which would do away with the liberty of parties to make their own contracts.

Letters patent of the United States being lawfully grantable only for new and useful inventions, are *prima facie* evidence that the inventions described in them are new and useful ones, and that the patents are valid; the degree of utility possessed by the invention—provided it is useful at all in the sense of being capable of application to some practical and beneficial purpose, and not be frivolous, or injurious to the well-being or morals of society—does not affect the validity of the patent. Therefore, so long as the validity of the patent stands, the question of whether the patent is really valuable or useful, or not, in either a less or greater degree, is not admissible for the purpose of inquiring into the adequacy of the consideration for a contract based upon the patent. To sustain these several propositions, we cite *Hardesty v. Smith*, 3 Ind. 39; *Nash v. Lull*, 102 Mass. 60; *Myers v. Turner*, 17 Ill. 179; *Richards v. Betzer*, 53 Ill. 466; *Leggatt v. Sands Brewing Co.*, 60 Ill. 158.

The second and only other question is whether the action was prematurely begun, it being contended that no action could be maintained until one year from April 1, 1896.

The “third” clause substantially set out in the synopsis we have adopted, as above, must be looked to for the determination of the question upon its merits. Applying the rule that words employed in contracts should be construed in accordance with their plain, natural and obvious meaning,

it would seem to be indisputable that appellees were entitled to receive from appellant in monthly payments, after April 1, 1896, whatever royalties should be shown to be due by the monthly statements provided for, which payments, however, should in no month be less than \$80. Such is our construction of the contract, notwithstanding the able and ingenious suggestions of counsel for appellant to the contrary.

It therefore follows that appellees, being entitled to have such monthly payments of not less than \$80, were at liberty to bring separate suits upon each installment so becoming due to them monthly, or to unite such installments as had become payable in one action. *Godfrey v. Buckmaster*, 1 Scam. 446 (470); *Consolidated Coal Co. v. Peers*, 150 Ill. 244.

The last cited case is substantially in point upon the main question under consideration.

It is also pointed out by appellees that the question whether the action was premature can not be raised by a plea of the general issue, but should have been raised, if at all, by a plea in abatement, and the cases of *Pitts' Sons Mfg. Co. v. Commercial Nat. Bank*, 121 Ill. 582, and *Palmer v. Gardiner*, 77 Ill. 143, are relied upon as so holding.

We are inclined to regard the point as well taken, but prefer to base our decision upon the merits.

Perceiving no error in the judgment, it will be affirmed.

**William H. Donnerstag and Arthur Donnerstag v.
Jacob Loewenthal, Adolph Loewenthal, Simon
Loewenthal and Emil Loewenthal,
Copartners as Jacob Loewenthal & Sons.**

1. **SHORT CAUSE CALENDAR—Affidavit Must Be Filed.**—Unless the affidavit required by Sec. 97, Ch. 110, R. S. (Hurd's Statute, 1898, page 1219), is filed, it is error to place a suit upon the short cause calendar and compel a party to proceed with the trial against his objection.

77	159
87	582
77	159
94	2408

2. *SAME—Upon What the Right to Place a Case on the Short Cause Calendar Depends.*—The right to place a case upon a short cause calendar and proceed with the trial, out of its order, depends entirely upon the filing of the affidavit as provided by the statute.

Assumpsit, for goods sold and delivered. Error to Superior Court, Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in the Branch Appellate Court of the First District at the October term, 1897. Reversed and remanded. Opinion filed May 31, 1898.

BULKLEY, GRAY & MORE, attorneys for plaintiffs in error.

WILLIAM J. FOX, attorney for defendants in error.

MR. JUSTICE HORTON delivered the opinion of the court.

This case was tried upon a call of the "Short Cause Calendar." The only point as to which we express any opinion is as to whether the case was properly upon that calendar.

Sec. 97, Ch. 110, Starr & Curtis' Stat. of Ill., provides that "Upon the plaintiff, his agent or attorney * * * filing an affidavit that he verily believes the trial of said suit will not occupy more than an hour's time, * * * said suit shall be placed by the clerk upon said short cause calendar."

Unless such an affidavit is filed it is error to place a suit upon the short cause calendar and compel a party to the cause to proceed with a trial thereof against his objection. The record here shows that about four weeks before said cause was finally called for trial, the plaintiffs in error moved to strike it from said calendar, upon the ground that no original affidavit, such as is required by the statute, had been filed, and again made said motion, stating the same ground therefor, just prior to the trial.

The right to place a cause upon the short cause calendar and to proceed with the trial thereof, out of its order, according to the date of its commencement, depends entirely upon the filing of an affidavit as provided by the section of the statute above quoted.

It is stated in a written notice served by the attorney for

the defendants in error upon the attorneys for the plaintiffs in error, that such an affidavit was made, and that a copy thereof was attached to said notice. That copy appears in the record. It is also stated in that notice that such affidavit "was duly filed in said suit." We have carefully examined the transcript in this case filed in this court, and such affidavit is not there. It was not filed as stated. That fact was distinctly brought to the attention of the attorney for plaintiffs in the trial court.

This case must be tried again, and we do not, therefore, wish to be understood as expressing any opinion as to the merits. From the record now before us, however, it seems as though the plaintiffs below should recover, and we dislike to reverse. But if an attorney does not file the original of the affidavit required by the statute, and persists in pressing a case for trial upon a call of the short cause calendar after notice by motion that only a copy of such affidavit (if there ever was an original) has been filed, he must not complain if the judgment he obtained can not be sustained.

The judgment of the Superior Court is reversed and the cause remanded.

J. C. Winship Company v. Joseph Wineman.

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97	*880

1. **RECOUPMENT**—*Is in the Nature of a Cross-Action.*—Recoupment is in the nature of a cross-action. In order to sustain such a defense, a defendant is subject to the same requirements, in respect to evidence, to which he would have been subject had he brought a distinct action against the plaintiff to recover for the same matter.

2. **CONTRACTS**—*Under Seal—Not to be Changed by Parol.*—A sealed executory contract can not be altered, changed or modified by parol agreement. This rule of the common law has been adopted by this court and consistently followed in a long line of unbroken authorities.

Assumpsit, on two checks. Trial in the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in the Branch Appel-

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J. C. Winship Co. v. Wineman.

late Court of the First District, at the March term, 1898. Affirmed.
Opinion filed May 31, 1898.

W. N. GEMMILL, attorney for appellant.

DUPRE, JUDAH, WILLARD & WOLF, attorneys for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

This suit was brought to recover upon two checks given by the appellant to appellee. The cause was tried by a jury, who were instructed by the court to return a verdict for the balance due upon said checks, which was done, and judgment entered thereon. With the declaration there was filed an affidavit in which it was stated that the demand of plaintiff below was for money due and owing from defendant below upon its two certain checks, describing them.

The defendant below filed the general issue, verified, and a notice of recoupment. The notice is that upon the trial of said cause the defendant would prove that the suit was on checks given by the corporation to appellee for rent under a lease signed by J. C. Winship (the individual); that at the time the checks were given, appellee owed Winship, under the terms of the lease, for damages growing out of the leasing of the premises, which appellee refused to allow Winship, caused through leakage from the roof occupied by Winship, which roof was negligently allowed to remain out of repair and in bad condition by appellee, and the water, coming through the same, damaged a large number of belts used in the building occupied by Winship, practically destroying the same and causing great annoyance and delay, the value of the belts amounting to nearly \$200; that likewise because of delay so caused by shutting down the business of Winship for a long time, Winship was otherwise injured in loss of business and other ways to an additional amount of \$500, and that appellee had often promised to pay the defendant for the injury sustained through the leakage and the damage thereby occasioned, but that it has neglected and at last declined absolutely to pay defendant anything whatsoever, and defendant asks to recoup whatever damages it or Winship had sustained.

Recoupment is in the nature of a cross-action. In order to sustain such a defense, the defendant below "was subject to the same requirements, in respect to evidence, to which it would have been subject had it brought a distinct action against the plaintiff, as its landlord, to recover for the same injury." *Mendel v. Fink*, 8 Ill. App. 381.

In the case at bar the lease offered in evidence is from the ancestor of appellee to J. C. Winship personally. Said Winship is not a party to this suit. Appellant occupied a part only of the premises leased to said Winship. What the agreement was between Winship and the appellant is not shown. We do not see any theory upon which appellant could have recovered from appellee for damages claimed by said notice to have been suffered by J. C. Winship personally.

Appellant sought at the trial to prove by said Winship, as a witness, the making of a parol agreement between said Winship and the ancestor of appellee, changing the terms of said lease. The court below very properly excluded such testimony. The ancestor of appellee, through whom he claims, being deceased, said Winship was not a competent witness by whom to prove such an agreement.

And the testimony offered was not admissible even if the witness had been competent. It was an effort to alter a sealed executory contract by a parol agreement. In *Alschuler v. Schiff*, 164 Ill. 298, the rule is very clearly stated thus (p. 302):

"There can no longer be any contention in this State over the general rule insisted upon by appellee, that a sealed executory contract can not be altered, changed or modified by parol agreement. This rule of the common law has been adopted by this court and consistently followed in a long line of unbroken authorities. *Chapman v. McGrew*, 20 Ill. 101; *Hume Bros. v. Taylor*, 63 Id. 43; *Barnett v. Barnes*, 73 Id. 216; *Loach v. Farnum*, 90 Id. 368; *Goldsborough v. Gable*, 140 Id. 269. One good reason for such a rule is, that a party will not be permitted to enforce a contract, or the opposite party to defeat its enforcement, by rely-

ing on a contract, part of which is in writing under seal, and part a parol agreement."

It is held in that case 'also that such a contract may be canceled and surrendered by parol agreement. But that is not what was sought to be done in the court below.

At the trial there was no testimony and no offer of any testimony tending to show that appellant had suffered any damage in any manner. A question was propounded to the witness Winship as to whether there had been any damage to his goods and premises by virtue of the leakage, or from any other cause. It is in this case, as between the parties thereto and under the pleadings, immaterial what damage, if any, Mr. Winship may have suffered. If any damage to his goods was caused by leakage of the roof, he could not recover therefor under the provisions of his lease. Neither is the question limited to damages such as might, under any circumstances, be charged to appellee. The question is too broad and too indefinite, and was not proper under any aspect of the case.

The judgment of the Circuit Court is affirmed.

John G. Byrne v. Guiseppi Panesi.

1. INSTRUCTIONS—*Services of a Physician and Nurse*.—In an action to recover for the services of a physician and nurse, it is error to instruct the jury that the plaintiff can not maintain an action for service as a physician, unless he proves by competent evidence that he had a license duly issued by the State Board of Health.

Assumpsit, for services. Trial in the County Court of Cook County, on appeal from a justice of the peace. The Hon. C. W. RAYMOND, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in the Branch Appellate Court of the First District, at the March term, 1898. Reversed and remanded. Opinion filed May 31, 1898.

FRED H. ATWOOD and FRANK B. PEASE, attorneys for appellant.

JOHNSON & McDANNOLD, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD delivered the opinion of the court.

This suit was based upon a claimed contract of employment of appellant to travel with appellee's invalid son as a physician and nurse. Upon appeal from a justice's court to the County Court a trial resulted in a verdict and judgment for thirty dollars. It would seem that there should have been a verdict for a larger sum, if any at all were to be recovered, but because the judgment must be reversed for error in the giving of one of defendant's instructions we will not comment upon the facts of the case to the possible prejudice of either party upon the next trial.

One of the assigned errors is the giving of improper instructions at the request of appellee.

The second instruction given for appellee was as follows:

"The court instructs the jury that the plaintiff can not maintain an action for service as a physician, unless he proved by competent evidence that he had a license duly issued by the State Board of Health, and if the same has not been proven, then the jury will find a verdict for the defendant."

The contract, if any, was for appellant's services both as a nurse and physician, and was acted upon, though terminated before a full performance as to the time originally arranged for the journey that was taken. There was no claim, and no evidence to support a claim, for services as physician separated from those as nurse. The two kinds of service in contemplation, and in fact rendered together, were as nurse and as physician, and to give an instruction including the element of one kind of service and excluding all reference to the other was error.

The judgment is reversed and the cause remanded.

First Methodist Episcopal Church v. Arthur Dixon et al.

1. *STATUTES—Construction of—Intention of the Law Makers.*—In the construction of statutes, the intention of the law-giver is to be deduced from a view of the whole and every part of a statute taken and compared together. The real intention, when accurately ascertained, will always prevail over the literal sense of terms.

2. *SAME—Construction of the Act of 1865.*—The act of 1865 (Private Laws 1865, Vol. 1, 288), amending the act of February 14, 1857, relating to the changing of the name of the Methodist Episcopal Church of Chicago, and for other purposes, and to enlarge the power thereof, is construed to embrace the making of a ground lease, as well as any other lease of the whole or any part of said premises belonging to said church, in Chicago.

3. *TRUSTS—Injuries Tending to Defeat the Purpose of.*—An injury which tends to defeat the power of the trust to provide revenue to be applied to building up Methodist churches in Chicago must be regarded as serious.

Bill to Construe a Trust.—Trial in the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Hearing and decree for complainants. Appeal by defendants. Heard in the Branch Appellate Court of the First District, at the March term, 1898. Affirmed. Opinion filed May 31, 1898.

STATEMENT.

Appellees, as trustees of the First Methodist Episcopal Church of Chicago, filed a bill to obtain a decree construing certain trusts upon which they hold the property known as the Methodist Church Block, on the southeast corner of Washington and Clark streets in said city. These trusts are defined in two special acts of the legislature, the material parts of which are as follows:

First. An act, approved February 14, 1857, entitled, "An act to change the name of the Methodist Episcopal Church, in the Town of Chicago, Cook County, Illinois, and for other purposes.

"Section 1. Be it enacted by the State of Illinois, represented in the General Assembly, that the name of that

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religious society, incorporated on the 20th day of November, A. D. 1835, under the provisions of an act entitled 'An Act Concerning Religious Societies,' approved on the 6th day of February, A. D. 1835, by the name of the 'Methodist Episcopal Church, in the Town of Chicago, Cook County, Illinois,' be and the same is hereby changed to, and shall hereafter be known as the 'First Methodist Episcopal Church of Chicago,' and in and by such name shall have and exercise all the powers conferred on such corporations, organized under the 'Third Division of the twenty-fifth chapter' of the Revised Statutes; and the present trustees of said corporation first above mentioned, shall be, and are hereby constituted, trustees of said 'First Methodist Episcopal Church of Chicago,' until their successors are elected, in pursuance of said 'Third Division' of said chapter of the Revised Statutes; and said trustees of said last named corporation, and their successors, shall hold and possess in fee, all the property, real and personal, donated to, and held, and belonging to said corporation first above named.

"Sec. 2. Said 'First Methodist Episcopal Church of Chicago' shall have power to convey said property in fee, by deed or mortgage, in security for money loaned or to be loaned thereon, for the erection on such real property of a place of worship, or such other improvements as may be desired. But after the erection of such place of worship or improvements, if any surplus remain, the same, and any rents which may accrue from said property, shall first be appropriated for the payment of such loan, and extinguishment of such mortgage; and any remainder to the purchase of a lot or lots in said city of Chicago, and the erection of a place or places of worship, to be under the control of the Methodist Episcopal Church, and for no other purpose whatever."

Second. An act to amend an act entitled, "An act to change the name of the Methodist Episcopal Church, in the Town of Chicago, Cook County, Illinois, and for other purposes, approved February 14, 1857, and to enlarge the powers thereof.

“Section 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly, that on and after the second Monday in January, A. D. 1866, the trustees of the ‘First Methodist Episcopal Church of Chicago’ shall consist of nine persons, who, on said day, shall be elected by the society constituting said ‘First Methodist Episcopal Church of Chicago,’ and that other society known as ‘Trinity Methodist Episcopal Church of Chicago,’ by joint ballot, whether they constitute one or separate societies. Of the trustees so to be elected, three and their successors shall be members of each of the above mentioned societies, and the remaining three and their successors shall be members of other Methodist Episcopal churches or societies in the city of Chicago, but no two of these last shall belong to one and the same society. At said first election three of said trustees shall be chosen to serve for one year, three for two years, and the remaining three for three years; and annually, thereafter, on the second Monday in January, the successors of those whose terms have expired shall be in like manner elected for three years, and at the same time elections shall be held to fill vacancies caused by death, removal from the city of Chicago, or otherwise; said elections to be called and held in accordance with by-laws to be established by said societies in joint meeting. Said trustees, so elected, shall have power to control and manage the real property belonging to said corporation, and to dispose of the rents accruing therefrom, in conformity with the provisions of this act, and the act to which this act is amendatory; and they shall hold their office until their successors shall be chosen, and a failure to elect trustees at any of the times above described shall in no way affect the existence or powers of said corporation, but their successors may be chosen at any annual election thereafter.

“Sec. 2. That whenever twenty certain bonds for one thousand dollars each, executed by said ‘First Methodist Episcopal Church of Chicago,’ on the first day of January, A. D. 1859, and secured by a deed of trust to George C.

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Cook, of the lot and building owned by said corporation, shall have been fully paid, it shall be lawful for the trustees of said corporation to purchase, hold and use a parsonage house and lot, or to purchase a lot and erect a parsonage house thereon, and keep the same in repair, for the use of such ministers of the gospel as may from time to time be duly appointed according to the discipline of the Methodist Episcopal Church to minister to the congregation worshipping in said building; and they may also, at their discretion, aid in the erection of church buildings within said city of Chicago, for the use and under the control of the said Methodist Episcopal Church, and may, from time to time, purchase lots within said city for the erection thereon of a place of worship, and convey the same to societies of said church for such use, and to be under such control; said parsonage or parsonage lot may be purchased at any time, but no part of the rents derived from the building aforesaid shall be applied toward payment of the same until all said bonds and all interest due on all incumbrances on said property shall have been fully paid; and said trustees shall not, for the purposes aforesaid or for any other purpose, except for the purchase of said parsonage, or the repair or re-erection of said building, contract liabilities which shall at any time exceed in the aggregate the net rents of said building in any one year.

“Sec. 3. Said trustees may appropriate of the rents derived from said building for the repair and refitting of any part thereof, whether used for public worship or otherwise, and also not exceeding one thousand dollars per annum for the support of the minister, from time to time, appointed as aforesaid, to preach the gospel to the congregation worshipping in said building.

“Sec. 4. In order to secure the payment of any indebtedness now owing by said corporation or any part of such indebtedness, or in case of the destruction or serious injury of said building from any cause, the same and the lot on which it stands may be conveyed by said trustees, by mortgage or deed of trust, as security for money borrowed to

pay such indebtedness, or to re-erect or repair said building, but shall not be aliened or conveyed for any other purpose whatever.

"Sec. 5. All the provisions of the act to which this is amendatory shall remain in full force so far as they are not inconsistent herewith."

WM. D. BARGE, attorney for appellant.

WILSON, MOORE & McILVAINE, attorneys for appellees.

MR. JUSTICE FREEMAN, after making the foregoing statement, delivered the opinion of the court.

Powers are expressly conferred upon the trustees by these acts, substantially as follows:

By the act of 1857, first, "All the powers conferred on such corporations organized under the Third Division of the twenty-fifth chapter of the Revised Statutes;" second, to "hold and possess in fee all the property, real and personal, donated to, and held and belonging to said corporation;" third, "to convey said property in fee by deed or mortgage in security for money loaned or to be loaned thereon for the erection on such real property of 'a place of worship, or such other improvements as may be desired;'" fourth, after payment of such loan the remainder of any surplus and any rents accruing to be applied to the purchase of lots in Chicago, and the erection of places of worship under control of the Methodist Episcopal Church, "and for no other purpose whatever."

By the amendatory act of 1865 enlarging the powers conferred by the act of 1857, the trustees are empowered, fifth, "to control and manage the real property belonging to said corporation, and to dispose of the rents accruing therefrom in conformity with the provisions of this act, and the act to which this act is amendatory;" sixth, to purchase, hold and use, and keep in repair a parsonage house and lot, or to purchase a lot and erect a parsonage thereon, for the use of the Methodist Episcopal minister appointed

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to minister to the congregation worshipping in said building; seventh, to buy lots and aid in the erection of church buildings in Chicago for other societies of the Methodist Episcopal Church, but they shall not for any purpose except purchase of parsonage or repair or re-erection of the building, contract liabilities exceeding the aggregate net rents in any one year; eighth, to appropriate money out of the "rents derived from the said building for the repair and refitting of any part thereof, whether used for public worship or otherwise;" ninth, to appropriate out of such rents "not exceeding one thousand dollars per annum for the support of the minister" appointed to preach "to the congregation worshipping in said building;" tenth, in order to secure payment of their existing indebtedness, "or in case of the destruction or serious injury of said building from any cause," to convey said building and lot by mortgage or trust deed as security for money to pay such debt, "or to re-erect or repair said building."

These express powers of the trustees may be further summarized as follows: They have power to hold in fee and control and manage the real property; to borrow money on and incumber the lot in question, in order to erect a place of worship or such other improvements thereon as may be desired, or to pay existing indebtedness, or in case of the destruction or serious injury of said building, to repair or re-erect the same, and also to contract liabilities for the repair or re-erection of said building, and the purchase of a parsonage for the minister preaching therein; to purchase lots for and to aid in building Methodist Episcopal Churches in Chicago from time to time, but not to such an extent as to contract total liabilities exceeding at any time the aggregate net rents of said building in any one year; to appropriate out of the rents derived from said building, money to repair and refit any part thereof, whether used for public worship or otherwise, and not exceeding \$1,000 per annum, for the support of a minister for the congregation worshipping therein.

The trustees are forbidden, by the act of 1857, to use the

surplus and rents "for any other purpose whatever," except as specified, and are also forbidden by the act of 1865, to alien or convey said lot and building for any other purpose whatever.

The trusts created by these acts are sought to be construed in three particulars.

First. Is it the duty of the trustees to maintain a place of worship upon this particular property?

Second. The power of the trustees to mortgage said property in order to erect a new building thereon.

Third. The power to make a ground lease.

Must a place of worship be maintained upon this property?

The act of 1835, under which the society was first incorporated, authorized its members to erect such houses and buildings as they may deem necessary for the purposes of religious worship, "and to make such other use of the land, and make such other improvements thereon as may be deemed necessary for the comfort or convenience of such society or congregation." But the act of 1857 removed these limitations in part, and allowed the trustees to borrow money for the erection either of a place of worship, "or such other improvements as may be desired." The act of 1835 authorized the erection of a place of worship and other improvements, such as might be deemed necessary for the comfort and convenience of the congregation, but these improvements were apparently intended to be such as were incidental to, and connected with the place of worship. By the act of 1857, the trustees could erect either a place of worship or the other improvements, and they can, as appears from provisions of the two later acts, maintain both.

It is clear that these improvements were expected to be of a rent-producing character. The act of 1857 especially provides for the disposition of "any rents which may accrue." It is true that the original incorporation in 1835 was "for the purposes of religious worship," and the act provided that the land acquired could be "held for the uses and purposes named, and no other," viz., religious worship. But the act of 1857 enlarged the scope of these uses and pur-

poses. By that act the purpose still was, not that a place of worship should necessarily be maintained on the land, but that the rents accruing from whatever other improvements might be erected there, should continue to be applied for the purposes of religious worship, in erecting places of worship elsewhere in the city.

Thereafter, by the act of 1865, these powers were in no way diminished, but were enlarged; and to indicate more clearly that there was no intention to restrict the use of the property to the purposes of a single congregation, it was provided that only one-third of the trustees should be chosen from the original society—the First Methodist Episcopal Church—while the other six trustees were to come, three from the Trinity Church, and three from other societies, constituting the general body of the Methodist Episcopal Church in Chicago. Indeed the appropriation out of the rents toward the support of a minister for the congregation worshipping upon the property is limited to \$1,000 annually, much less than an adequate salary, the balance of the rents being reserved for the other uses specified. This balance is not appropriated for the support of that particular church. It is to be applied chiefly to the purchase of lots and erection of places of worship in Chicago, which may be conveyed to societies of, and be for the use and under the control of the Methodist Episcopal Church.

The sale of the property in question is expressly forbidden; and if the trustees must retain a place of worship on these premises, then no matter how undesirable for such a purpose the locality may become, no matter though the congregation should refuse or be unable to maintain worship there, no change would be possible. The evidence tends to show that it is a serious question as to whether the congregation worshipping there will be able to maintain preaching at that place for any great length of time; that the present attendance is from seventy-five to one hundred and twenty persons, while the place of worship provided there has seating capacity for a thousand. This decline is stated to be

continuing and believed to be permanent. If it continues until there is no congregation left there able to support religious services, then the maintenance of a place of worship upon the property in question, not in use nor expected to be used, in the heart of the business district of the city, would seem to be of more than doubtful propriety.¹ It is not, we think, required by the acts under which the First Methodist Episcopal Church of Chicago is organized and exists.

Can the trustees mortgage the real property belonging to the corporation in order to erect a new building thereon?

The power to mortgage in order to secure money borrowed to re-erect or repair the building on the lot in question may be exercised "in case of the destruction or serious injury to said building from any cause." Stated plainly, the query here is, can the trustees tear down the present structure, which the evidence tends to show is inadequate, out of repair, and improperly constructed for the locality and the conditions which now exist there, and mortgage the property, or convey it by deed of trust to obtain money to erect a new building better adapted for the purposes for which the trust exists? The building has not been destroyed nor has it been seriously injured by any direct agency such as fire, storm or flood. The evidence does indeed tend to show that it has been so injured, but the injury has been gradual, from other and slowly acting causes. Under the language of the statute the injury must be serious, and if it is so, then the cause is not material. Any cause producing serious injury is sufficient.

In determining what degree and character of injury must be considered as serious within the purport of the statute, regard must be had to the whole meaning and intent of the acts under consideration. This is a well settled and familiar rule.

"It is an established rule, in the construction of statutes, that the intention of the law-giver is to be deduced from a view of the whole and every part of a statute taken and compared together. The real intention, when accurately ascertained, will always prevail over the literal sense of terms." *Hamilton v. The State*, 102 Ill. 367.

Any injury which tends to defeat the purpose of the trust to provide revenue to be applied to building up Methodist churches in Chicago, must be regarded as serious. The trustees "hold and possess in fee" the property in question for the purposes of the trust. It is not an ownership for a limited time, but for all time so far as the statute provides. In ordinary human experience buildings suitable for the needs of one generation are frequently not adapted to the wants of the next. To require such a building to be retained when its income-producing capacity is gone, or so greatly reduced as practically to defeat the object of the trust, would be to require the preservation of a relic of the past, and this is no part of the purpose for which the trust has been created. The evidence tends to show that the present building is unsuited to the needs of the locality where it stands. It is impracticable to remodel it. It is not of fire proof construction. It is without steam heat, without vaults, and without elevator service. One floor is devoted to an audience room for a large congregation, which has practically departed. A building which time and changing conditions have rendered so seriously defective, has certainly suffered injury within the scope and contemplation of the statute, and it is within the power of the trustees to remove it and erect another in its place.

The third of the questions presented for our consideration is, have the trustees power to make a ground lease of this property.

The testimony tends to show that it may be good business management to erect upon this property a modern high-class office building to take the place of the present structure, which is not adapted to the needs of the locality, and is of a character and construction such that it would be impracticable to remodel it, and cheaper to tear it down than to repair and reconstruct it. The erection and management of a modern, high-class, expensive building is said to be an enterprise requiring careful and experienced business management. It is probably true, as stated by appellees' counsel, that it is at least of doubtful expediency for

the trustees of a church corporation to enter upon such an enterprise. In case, therefore, the trustees should be advised that this is the wisest plan for the use of the property to carry out the purposes of the trust, it may become their duty to consider the propriety of making a long ground lease to competent persons who may be willing to assume the business risk and management, and pay a fixed rental for the property.

By the act of 1865 the trustees are given "power to control and manage the real property belonging to said corporation." We perceive no reason why this power to control and manage does not embrace the making of a ground lease, as well as any other lease of the whole or any part of said premises. The trustees are given power also "to dispose of the rents accruing" from said real property, in conformity with the provisions of the act. There can be no doubt, we think, but that this power to control and manage and dispose of the rents from "the real property" belonging to said corporation, applies to ground rents equally with other rentals, and that the trustees have full power to make leases for the one equally with the other. The judgment of the Circuit Court is affirmed.

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**West Chicago Street Railroad Co. v. Abram E. Mabie,
Adm'r.**

1. *DAMAGES—Death from Negligent Act—Where the Action Lies.*—At common law no right of action accrued to an administrator on account of the death of his intestate from the negligence of another. There can be no recovery except under and by virtue of the statute, and that limits the recovery to the pecuniary injuries resulting from such death to the wife and next of kin. A verdict can not be sustained for anything more than the pecuniary injury.

2. *PLEADINGS—In Actions for Damages—Death from Negligent Act—Allegations of Survivorship.*—The fact of survivorship of a widow or next of kin is an essential element of a cause of action, and it is indispensable that it should be alleged and proved.

3. *SAME—Defects Cured by Verdict.*—If the declaration omits to

allege any substantial fact which is essential to a right of action, and which is not implied in, or inferable from the finding of those which are alleged, a verdict for the plaintiff does not cure the defect.

4. *SAME—Defects Not Cured by Verdict.*—In an action for damages resulting from the death of a person by the negligent act of another, the fact the deceased left surviving next of kin is a substantial and material allegation, and is essential to the right of action. Its omission is not cured by verdict.

Trespass on the Case.—Death from negligent act. Trial in the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in the Branch Appellate Court of the First District at the March term, 1898. Reversed and remanded. Opinion filed May 31, 1898.

ALEXANDER SULLIVAN, attorney for appellant; E. J. McARDLE, of counsel.

JOHN F. WATERS, attorney for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

This suit was brought by the appellee as administrator of the estate of Lizzie Knuth, a child between three and four years of age, to recover damages for her death, caused by a grip-car owned and operated by appellant.

The verdict and judgment are for the sum of \$4,000. The deceased was less than four years old at the time of her death. At common law no right of action accrued to an administrator in such a case. There can be no recovery except under and by virtue of the statute of this State, which limits the recovery to "the pecuniary injuries resulting from such death to the wife and next of kin." A verdict can not be sustained for anything other than or beyond the "pecuniary injury." There can be no recovery upon the basis of a parent's love. That is priceless. There may be the keenest anguish without pecuniary loss. The evidence will not sustain so large a verdict, there being no evidence of any special pecuniary injury. *W. C. St. R. R. Co. v. Scanlon*, 68 Ill. App. 626; *N. C. St. R. R. Co. v. Wrixon*, 51 Ill. App. 307.

As this case must be reversed and remanded for another

trial, for reasons other than the amount of the verdict, we do not express any opinion, further than as above, as to the amount of the judgment, limited, as it must be, to "pecuniary injury."

This is an action under the statute above referred to (Ch. 70, Sec. 26), and is "for the exclusive benefit of the widow and next of kin." An averment is, therefore, necessary in the declaration showing the facts as required by the statute. The only averments the declaration contains on the subject are the following:

"And plaintiff avers that he, as the administrator of the said Lizzie Knuth, by means of the premises was forced to pay, lay out, expend and become liable for the payment of large sums of money, to wit, the sum of one thousand dollars (\$1,000), in and about a proper, decent and appropriate burial of the said Lizzie Knuth; and as the administrator of the said Lizzie Knuth he has, by means of the premises, sustained and suffered great loss, injury and damage, to wit, the sum of five thousand dollars (\$5,000).

"Wherefore, in accordance with the statutes in such cases made and provided an action has accrued to the plaintiff as administrator of the goods, chattels and effects of the said Lizzie Knuth, for the exclusive benefit of the father and the mother and the next of kin of the said Lizzie Knuth, to demand for, of and from the said defendant the said several sums of money above demanded in manner and form as is hereinabove alleged, and therefore he brings his suit."

Nowhere in the declaration is there any averment that the deceased in fact left her surviving any next of kin. Unless there be next of kin, there is no cause of action. In *L. S. & M. S. Ry. Co. v. Hessions*, 150 Ill. 546, 556, it is said that "It is the settled law that the fact of survivorship of a widow or next of kin is an essential element of a cause of action, and it is therefore indispensable that it should be alleged and proved. *C. R. I. & P. Ry. Co. v. Morris*, 26 Ill. 400; *Quincy Coal Co. v. Hood*, 77 Id. 68; *Safford v. Drew*, 3 Duer, 627."

The language of the declaration in this case is simply and

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only to the effect that under the statute a cause of action has accrued to the administrator for the benefit of, but without stating definitely that there are any next of kin. The declaration should state that there are next of kin, and who they are and what the relationship is.

On behalf of appellee it is urged that this defect is cured by verdict. "The rule is, if the declaration omits to allege any substantial fact which is essential to a right of action, and which is not implied in or inferable from the finding of those which are alleged, a verdict for the plaintiff does not cure the defect." *Bowman v. The People*, 114 Ill. 474, 477.

It is not "implied in or inferable from" the allegations that the deceased lost her life by reason of the negligence of appellant, that she left her surviving any next of kin, a "substantial fact which is essential to a right of action," an "essential element of a cause of action."

In the case of *Quincy Coal Co. v. Hood*, Adm'r, 77 Ill. 68, which was an action under this same statute, the declaration did aver that the deceased left him surviving next of kin, and stated who it was, viz., the father. Upon the trial the plaintiff was permitted to show that there were next of kin other than the one named in the declaration, viz., a mother and brothers and sisters. This was held to be erroneous and not cured by verdict.

The judgment of the Circuit Court is reversed and the cause remanded.

Albert L. Adam and William F. Bahn v. Daniel H. Tolman.

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1. NOTICE—*Open and Visible Possession*.—A deed, though not recorded, is good as between the parties to it, and the actual, open and visible possession of the granted premises taken and held by the grantee is equivalent to notice to all third persons, of the grantee's rights under the unrecorded deed to him.

2. LIEN—*Of Subsequent Judgment and Prior Unrecorded Deed*.—It

would be contrary to all rules recognized by the law of this State to give priority to the lien of a subsequent judgment over a prior unrecorded deed, where the grantee in the deed had entered and was in actual, open and visible possession under the unrecorded deed.

8. *MORTGAGE—By Person in Possession Without Record Title.*—The giving of a mortgage upon land by the actual occupant of the premises, without having a title or claim of any kind of record, is so unusual a circumstance as to demand inquiry by anybody dealing with the land pending open possession thereof by the one making such mortgages.

Bill to Remove Clouds.—Trial in the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Hearing and decree for complainants. Appeal by defendants. Heard in the Branch Appellate Court of the First District, at the March term, 1896. Affirmed. Opinion filed May 31, 1896.

J. HENRY KRAFT and G. W. DUWALT, attorneys for appellants.

J. S. PAINTER, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD delivered the opinion of the court.

This was a bill in chancery, brought by appellee, charging that certain judgments in favor of appellants, and other persons, against one Eleanor A. Allan, were claimed and asserted by the holders thereof to constitute liens upon certain premises alleged to belong to the appellee, and asking that such judgments be declared to be null and void as to appellee, and a cloud upon appellee's title, and as such be removed.

The relief prayed for was granted, and the decree is now here for review.

The facts found by the decree are quite as briefly stated in the abstract as can be done by us, and together with the ordering part, are as follows:

"That about April 25, 1889, said Eleanor A. Allan, with James M. Allan, her husband, executed and delivered a deed to said premises to Lily F. Smith; that said premises were then improved by a dwelling house, and that immediately after execution of said deed, said Lily F. Smith

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entered thereon and occupied the same as her home, and at the same time, with Marcus W. Smith, her husband, by trust deed executed to William Loeb, as trustee, conveyed said premises to secure \$762, represented by fifty-one promissory notes, and given as in said deed recited, as part purchase money of the premises in said deed described, and which was recorded in said county on May 8, 1889; but that said deed so executed and delivered by said Eleanor A. Allan and her husband, was not recorded; that said Lily F. Smith remained in possession of said premises as her homestead up to December 30, 1889, when she, with her husband, by quit-claim deed, conveyed said premises to Eleanor Story, which deed was acknowledged and delivered and filed for record in said county.

“That Mrs. Story, through tenants, took possession of said premises, and remained in the actual, open and notorious possession thereof until March 10, 1891, when she conveyed to complainant, who took possession of said premises, and through tenants remained in the actual, open and notorious possession of said premises until he entered into a contract for the sale of the same, when he delivered possession thereof to the person with whom said contract for sale was made, and through him is now in the actual, open and notorious possession of said premises.

“That at the time complainant acquired title to said premises he held notes secured by trust deed on said premises, which was a lien thereon at the time the same was conveyed to said Lily F. Smith; also notes secured by a trust deed given by said Lily F. Smith; but that afterward believing himself to have a good title, he caused said incumbrances to be released.

“That after the conveyance by Eleanor A. Allan and while said premises by the records of said county appeared to be owned by her, numerous judgments were recovered against her, which, by said records, appeared to be liens thereon; that said judgment creditors have been made defendants and have all been defaulted except the appellants, who appeared and defended, claiming a lien on said

premises by virtue of their judgment, but the court finds that at the time they recovered said judgment said premises had been conveyed to Lily F. Smith; that she was in possession thereof, occupying them as her homestead; that her possession of said premises was notice to the world of her rights therein, and that Eleanor Story, by her deed from Lily F. Smith, acquired said premises free from the lien of all of said judgments.

"That all material allegations of the bill are true, as therein stated; that the equities are with the complainant, and that he is entitled to the relief prayed.

"It is therefore ordered and decreed that said judgments be, and the same are hereby set aside and declared null and void, as against the complainant, his heirs and assigns, as a cloud upon his title in and to said premises, and that the appellants pay the costs of this suit, except service of summons on the other defendants, and that execution issue therefor."

The correctness of such findings is strongly attacked by counsel for appellants, but after an attentive consideration of all the evidence heard by the master, we are satisfied they are substantially correct, and that the decree is plainly in accordance with the evidence and the right. In justice, no essentially different decree should have been entered, and the decree that was entered was the right one.

The deed from Mrs. Allan to Mrs. Smith, though not recorded, was good as between the parties to it, and the actual, open and visible possession of the granted premises taken and held by Mrs. Smith was equivalent to notice to all third persons of Mrs. Smith's rights under the unrecorded deed to her. *Partridge v. Chapman*, 81 Ill. 137; *Coari v. Olsen*, 91 Ill. 273; *Cabeen v. Breckenridge*, 48 Ill. 91; *Brainard v. Hudson*, 103 Ill. 218; *Scates v. King*, 110 Ill. 456; *Jaques v. Lester*, 118 Ill. 246; *Thomas v. Burnett*, 128 Ill. 37.

It would be contrary to all rules recognized by the law of this State to give priority to the lien of a subsequent judgment over a prior unrecorded deed, where the grantee

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in the deed had entered and was in actual, open and visible possession under her unrecorded deed; and this would be especially true where there existed, as in this case, the record of a purchase money mortgage given by the grantee in the unrecorded deed.

The giving of a mortgage upon land by the actual occupant of the premises, without having a title or claim of any kind of record, is so unusual a circumstance as to demand inquiry by anybody dealing with the land pending open possession thereof by the one making such mortgage.

To follow each one of the many contentions of the appellants and refute them, would demand of us to incorporate into this opinion all the evidence heard by the master—a task which the merits of the various contentions do not justify.

We are satisfied, after a review of the whole case, that the decree should be affirmed, and it is so ordered.

Haymarket Theater Co. v. Samuel Rosenberg.

1. *NEGLIGENCE—Leaving Door of Elevator Open.*—Leaving the door to the passenger elevator shaft open and unguarded, so that persons taking the usual course to enter the elevator car might fall down the shaft, is negligence under the circumstances shown in this case.

2. *PRACTICE—Entering a Remittitur.*—It is the settled law of this State, at least for this court, that a trial judge may require the entering of a remittitur as a condition to its refusing to grant a motion for a new trial.

3. *RECORDS—Supplying Lost Instructions.*—Substitutes for instructions given in a suit, but lost, can not be inserted in the bill of exceptions where there is no note or memoranda made by the court as to said instructions, upon which to base the substitutes.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the October term, 1897. Affirmed. Opinion filed May 31, 1898.

GEO. W. STANFORD and CHARLES B. STAFFORD, attorneys for appellant.

C. S. O'MEARA, attorney for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

At the time of the injury complained of the appellant was the owner of the building known as Haymarket Theater building. The front portion of that building was used for stores on the main floor and above that was rented for offices. The rear portion was used as a theater. There was a passenger elevator in the building for the use of the tenants and others wishing to reach the floors above the stores. Appellee was a tenant in said building, occupying a portion of one of the office floors. The morning of June 21, 1895, appellee, when proceeding to his office, in attempting to enter the elevator in said building at the main floor, fell down the elevator shaft to the basement. The door to the elevator shaft was open and the elevator car was above the main floor.

Considerable space is devoted to the question of whether the hall leading to and about the elevator on the main floor was properly lighted. That was a question of fact for the jury which was fairly presented by the testimony and properly submitted. Leaving the door to the passenger elevator shaft open and unguarded, so that persons taking the usual course to enter the elevator car might fall down the shaft, was negligence under circumstances shown in this case. All the facts and circumstances were fairly submitted to the jury.

Appellant contends that the amount of the judgment is excessive. The verdict of the jury was \$5,000. The trial court required plaintiff to remit \$2,000 and entered judgment for \$3,000. It is the settled law of this State, at least for this court, that a trial judge may require the entering of remittitur as a condition to its refusing to grant a motion for a new trial, and it must therefore be held that there was no error in this case in that regard. While the amount of the judgment is, as it seems to us, too large, yet we can not say that it is so excessive as to warrant a reversal for that reason.

Haymarket Theater Co. v. Rosenberg.

April 24, 1897, final judgment was entered and leave given to appellant to file its bill of exceptions. June 22, 1897, by agreement of parties it was by the court "ordered that the time to restore the missing instructions in this cause and to file the bill of exceptions herein be and the same is hereby extended ten days." It is conceded by both parties that the original instructions asked, those refused as well as those which were given, are lost and are not in the transcript of record filed in this court. Such instructions were not nor were any of them restored within the time limited by said order, or at any other time. There is no further or other order of court referring to the instructions. In the certificate of the trial judge to the bill of exceptions is the following statement:

"This bill of exceptions does not contain six instructions which were tendered to the court for the plaintiff by the plaintiff's counsel at the close of this trial, and three of which were given to the jury and so marked, and the remaining three of said instructions were refused to be given to the jury by the court, and so marked; and this bill of exceptions does not contain the actual instructions tendered by the defense, and which the court refused to give to the jury; all of the said instructions herein referred to were lost or mislaid, and diligent search made for them by the court, by counsel for both parties, and by the clerks of the court, without success. The instructions inserted in this bill as defendant's refused instructions are substitutes for the lost instructions filed by leave of court, and are substantially accurate reproductions of the originals tendered to and refused by the court at the trial. These substituted instructions were prepared by counsel for defendant from his original minutes and recollection of the lost instructions. The plaintiff's instructions, both refused and given, did not, however, cover the question of independent contract, which is raised in this case by the defendant's refused instructions."

There is no pretense or claim that appellee's instructions have been restored. The court says that they did not "cover" the question of independent contract. That ques-

tion has been argued quite at length in the briefs and arguments filed here. It is stated that the instructions inserted in the bill of exceptions as defendant's are "substitutes" only, and are "substantially" accurate reproductions, and that they "were prepared by counsel for defendant from his original minutes and recollections of the lost instructions."

It will be noticed that there is no note or memoranda made by the court as to said instructions, upon which to base the substitutes, and that the judge does not even state that he has a recollection as to the contents thereof. There is no record of any leave of court to file the substitutes. There is no affidavit, not even a personal statement by appellant's attorneys, that the substitutes are copies or accurate reproductions. Their "minutes" are not shown, nor is there any statement by them, or either of them, that they have any definite recollection even as to the contents or form of the lost instructions, or any of them. It will not do to make up a record in this manner. We can not consider the so-called substitutes as being a part of the record.

The judgment of the Superior Court is affirmed.

Chicago & Eastern Illinois R. R. Co. v. John Cleminger.

1. **DAMAGES—\$21,000 Held Excessive.**—Plaintiff, while a passenger upon a train of the Eastern Illinois Railroad Company, was injured by the negligence of the company. He was a man of ordinary health and strength; there was evidence tending to show he has been reduced by these injuries to the condition of a hopeless invalid. A judgment for \$21,000 was held excessive.

2. **VERDICTS—When Excessive—Remittitur.**—Where no error appears in the proceedings at the trial, and the evidence supports the verdict for the larger part of the amount awarded, and the amount of the verdict does not of itself indicate any improper motive on the part of the jury, it would seem a hardship to remand the appellee to the delay and expense of another trial if he is willing to remit an amount which will reduce it to such a sum as the weight of the evidence shows he is entitled to.

3. **SAME—When Grossly Excessive.**—If a verdict is so grossly excessive as to indicate that it could have been reached only through passion or prejudice on the part of the jury, it will be illogical to treat any part

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of it as worthy to support a judgment. And when it is so flagrantly excessive as to be only accounted for on the ground of prejudice, passion or misconception, a remittitur does not remove the objection to it.

4. *REMITTITUR—Practice of Allowing.*—The practice of allowing a remittitur in this court is authorized by the statute. Sec. 82, Practice Act (Hurd's Statutes, 1897, page 1216).

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the October term, 1897. Affirmed on remittitur, as ordered. Opinion filed May 26, 1898.

MR. JUSTICE SEARS delivered the opinion of the court.

Appellee (while a passenger upon a train of the Eastern Illinois Railroad Company, appellant,) was injured in a collision caused by the negligence of appellant. There is no dispute as to liability of appellant, and there can be no question that injury was sustained by appellee. Upon the trial appellee was awarded the sum of \$21,000 as damages, and a judgment for that amount was rendered.

The only errors assigned, which are presented in the brief of counsel for appellant, are:

1st. That counsel for appellee made statements to the jury which were not based upon evidence in the case, and were likely to be prejudicial to appellant.

2d. That the court erred in giving the only instruction which was proffered by appellee.

3d. That the verdict is excessive.

As to the statements of counsel for appellee, it is enough to say that, while objections were interposed, no ruling of the court was had, or refused, to which an exception was preserved. *Holloway v. Johnson*, 129 Ill. 367; *W. C. St. R. Co. v. Sullivan*, 165 Id. 302.

The only instruction proffered by appellee and given by the court is the following:

"If the jury find the issues for the plaintiff, then the plaintiff is entitled to recover such actual damages as the evidence may show he has sustained as the direct or proximate result of such injury, taking into consideration his

loss of time, his pain and suffering, his necessary and reasonable expenses in medical and surgical aid, so far as the same may appear from the evidence in this case; and if the jury find from the evidence that such injury is permanent and incurable, they may also take this into consideration in assessing the plaintiff's damages."

It is objected that this instruction is faulty, in that it uses the word "evidence" instead of the term "preponderance of evidence." Counsel contend that instead of instructing the jury that plaintiff could recover such actual damages as the evidence may show, etc., they should have been told to regard only such actual damages as a preponderance of the evidence may show; and that the pain, suffering, expense, etc., to be considered should have been limited to such only as appeared from a preponderance of the evidence.

We regard the objection as fanciful rather than substantial. The word "evidence," as here used, could, in reasonable interpretation, mean nothing less than all the evidence. The jury were instructed as to determining what constituted a preponderance of the evidence in the tenth instruction given at request of appellants; and in the eleventh of appellants' instructions the word "evidence" is used as it is in the instruction complained of, *i. e.*, without the qualifying word "preponderance."

It is also objected that the instruction in question is erroneous, because it presents to the jury as a possible element of damage, "reasonable expenses in medical and surgical aid." Counsel contend that there is no evidence in the record which would warrant any such damages.

But Dr. George, a witness called by appellants, testified: "My bill against him (appellee) for services in that matter is, perhaps, \$30 or \$36." The testimony is sufficient to warrant the giving of the instruction in the respect questioned. Nor does it matter that the bill was unpaid at the time of the trial. *Consolidated Coal Co. v. Scheiber*, 65 Ill. App. 304.

The third assignment of error upon which counsel for appellants rely is that the verdict is excessive.

The verdict is for a very considerable amount. But if the testimony of appellee is to be credited, his injuries, which resulted from the negligence of appellants, are very serious. From his testimony, if it stood alone and uncontradicted, it would be a fair conclusion, that from a man of ordinary health and strength he has been reduced by these injuries to the condition of a hopeless invalid. Nor would the fact that he has, during a part of the time since receiving his injuries, been engaged in the occupation which he had before that time followed, necessarily and conclusively refute his story as to his physical condition. Invalid as he is, according to his statements, he might yet, under stress of circumstances, continue to labor, though with doubtful efficiency, at his former work. In much of his testimony appellee is corroborated by his son, his daughter and five other witnesses, three of whom were also relatives. In a considerable part of his testimony he is also corroborated by medical experts, Dr. Church, Dr. Moyer and Dr. Flood. To some slight extent he is corroborated by Dr. F. W. Jay, a medical expert, called by appellants. On the other hand he was contradicted by many witnesses, both as to his physical condition before the injury and after.

From a careful examination of all the evidence, we reach the conclusion that as to a considerable part of his representations as to his physical condition before and after the injuries, appellee is supported by such testimony as would warrant a jury in finding that it constituted a preponderance of the evidence.

There are, however, certain elements of damage claimed, to substantiate which no preponderance of the evidence can be found.

We are of opinion that the verdict, while not warranted as to its entire amount by the credible evidence in the case, is yet not so far in excess of such an amount as the credible evidence would support, as to indicate passion or prejudice upon the part of the jury. There is no error in the procedure of the trial court. The question is then presented as to the duty of this court in case of such a verdict,

whether the court should reverse the judgment thereon and remand the cause for a trial *de novo*, or permit the appellee to remit an amount which would reduce the judgment to such a sum as could be said to be supported by the evidence in the case.

If a verdict is excessive, and there has been error in the proceedings, which might tend to produce an improper finding by the jury, we are of opinion that no attempt should be made to cure the verdict by a remittitur. *W. C. St. Ry. v. Krueger*, 68 Ill. App. 450.

If a verdict is so grossly excessive as to indicate by its very amount that it could have been reached only through passion or prejudice on the part of the jury, it would be illogical to treat any part of such verdict as worthy to support a judgment. *Lowenthal v. Streng*, 90 Ill. 74, wherein the court said: "And when it is so flagrantly excessive as to be only accounted for on the ground of prejudice, passion or misconception, the remittitur does not remove the prejudice, passion or misconception."

But where no error appears in the proceeding at the trial, where the evidence supports a verdict for the larger part of the amount awarded, and it can not be said that the amount of the verdict of itself indicates any improper motive on the part of the jury, it would seem a hardship to remand the appellee to the delay and expense of another trial, if he be willing to remit an amount which would reduce the judgment to such sum as the weight of the evidence shows he is entitled to.

The practice of allowing a remittitur in this court is authorized by the statute (Sec. 82, Practice Act), and such practice has been followed by this court in judgments *ex delicto*. *Elgin C. Ry. Co. v. Salisbury*, 60 Ill. App. 173. And by the Supreme Court, when reviewing as to questions of fact. *C., B. & Q. R. Co. v. Dixon*, 88 Ill. 431.

And the practice as followed by this court has been repeatedly approved by the Supreme Court. *N. Chi. St. R. Co. v. Wrixon*, 150 Ill. 532; *C., M. & St. P. Ry. Co. v. Walsh*, 157 Id. 672; *Elgin City Ry. Co. v. Salisbury*, 162 Id. 187.

Nor is such practice peculiar to the courts of review of this State, but it is approved as well by the majority of the courts of other States, where the question has been passed upon. *Holmes v. Jones*, 121 N. Y. 461; *Hennesy v. Dist. of Columbia*, 19 D. C. 220; *M. P. Ry. Co. v. Dwyer*, 36 Kan. 58; *Peyton v. T. & P. Ry. Co.*, 41 La. Ann. 861; *Howard v. Grover*, 28 Maine, 97; *G. H. & S. A. Ry. Co. v. Duelin*, 86 Tex. 450; *Lombard v. C., R. I. & P. Ry. Co.*, 47 Ia. 494; *Phelps v. Cogswell*, 70 Cal. 201; *Cogswell v. W. S. & N. E. E. Ry. Co.*, 5 Wash. 46; *Brown v. So. Pac. Ry. Co.*, 7 Utah, 288; *S. C. & P. R. Co. v. Finlayson*, 16 Neb. 578; *Kennon v. Gilmer*, 9 Mont. 108; *Hutchins v. St. P., M. & M. R. Co.*, 44 Minn. 5.

In the latter case, which was an action *ex delicto* and for negligence, the court said: "Within certain limits, much must be left to the sound judgment of the jury, and a court has no right to substitute its estimate for theirs; but we have a right to say that beyond a certain amount there is, in any reasonable view of the case, absolutely no evidence to sustain it."

We are of opinion that the ends of justice will be subserved, and no wrong done to appellants, if appellee be permitted by a voluntary remittitur to avoid a reversal of the judgment here. If appellee shall, within ten days, remit the amount of \$6,000, the judgment will be affirmed as to the remainder thereof; otherwise the judgment will be reversed and the cause remanded. In either event the costs here will be recovered by appellants.

Affirmed on remittitur.

Chicago and Eastern Illinois Railroad Co. v. Mary Maloney, Adm'x.

1. RAILROADS—*What is a Train Within Sec. 90, Ch. 114, R. S.*—The provisions of Section 90, Ch. 114, Hurd's Rev. Stat., providing that, "No railroad corporation shall run or permit to be run upon its railroad, any train of cars, for the transportation of merchandise or other freight, without a good and sufficient brake attached to the rear or hindmost

car of the train, and a trusty and skillful brakeman stationed upon said car, unless the brakes are efficiently operated by power applied from the locomotive," was evidently intended to apply to trains running from one place or station to another, and has no application to a few cars being switched about in a freight yard.

2. MASTER AND SERVANT—*Risks of Employment*.—When a person enters the employ of another he assumes the natural and ordinary risks incident to such service.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in the Branch Appellate Court of the First District, at the March term, 1898. Reversed and remanded. Opinion filed June 21, 1898.

W. J. CALHOUN, attorney for appellant; W. H. LYFORD, and J. B. MANN, of counsel.

JOHNSON & McDANNOLD, attorneys for appellee.

STATEMENT.

The appellee's intestate, James Maloney, was, at the time of his death, employed by the appellant as a laborer in its freight yard in the city of Chicago, known as the "Thirty-third street" yard. The special duty of the decedent was to clean the snow and ice from the switches in this yard. He had been engaged in this employment but three days, including the day he was killed. The accident in question occurred about five o'clock in the evening of January 16, 1895. Maloney was working at a switch, as above stated, when a switch engine with a cut of fourteen cars came from the north, passed over the switch at which Maloney was working, and stopped a short distance south thereof. The locomotive was at the south end of the string of cars but headed north. It was the purpose of the crew of the cars to back the train through the switch where Maloney was working, to another part of the yard. As the train passed on its way south, one of the crew in charge of it dropped off the rear car at this switch, opened it, and after the train stopped he signaled the engineer to back

the train north and through the switch, and the train thereupon started, the locomotive pushing the cars ahead of it toward the north.

As the train passed over this switch in the first instance, going south, Maloney stepped aside to let it go by, and then returned to his work at the switch, with his back toward the train, his face to the north. The train proceeded back slowly, and coming up behind Maloney, struck him in the back. He seems to have caught on the brake machinery in some way, and was carried or dragged some distance before going under the car; finally his foot caught on a switch rod or some other obstruction, and he was thrown under the car. One or more of the cars passed over him, and he was so cut and mangled before the train was stopped that he died within a few minutes.

The appellee, as the administratrix of his estate, brings this suit, under the statute, to recover damages for the benefit of the next of kin. A trial was had, which resulted in a verdict for the appellee for \$5,000. A motion for a new trial was overruled, judgment was entered on the verdict, and the defendant below prosecutes this appeal.

The declaration alleges negligence generally on the part of appellant in the management of its train in the city of Chicago; that the locomotive was at the rear end of the train pushing fourteen cars in the night time, there being no brilliant and conspicuous light on the first car, as required by an ordinance of said city; and that there was no watchman upon the first of said cars so being pushed backward.

MR. JUSTICE HORTON, after making the foregoing statement, delivered the opinion of the court.

Whether or not there be negligence in a transaction, is usually a question of fact. Under the testimony and pleadings in this case there was no negligence on the part of appellant unless it be (1) because there was no bell rung or whistle blown on the locomotive; or (2) because the accident occurred in the night time and when there was no light on the first car; or (3) because there was no watchman on the

first (or front) car, and no light there, and no warning to deceased that a train was approaching.

First. It might, perhaps, be claimed that there was conflict in the testimony as to the sounding of a whistle, but there can be no doubt whatever, from the testimony, but that the bell was operated by steam and was being rung. Indeed, attorneys for appellee do not claim in their argument that there was any negligence in this respect.

Second. As to the point that there was no light on the front car when the accident occurred, which is alleged to have been in the night time, attorneys for appellee say that this was entirely abandoned at the trial, because not sustained by the evidence.

Third. It is contended by appellee that appellant was negligent in not having complied with the provisions of Section 90, Ch. 114, Hurd's Rev. Stat., which is as follows, viz.:

"No railroad corporation shall run or permit to be run upon its railroad, any train of cars, for the transportation of merchandise or other freight, without a good and sufficient brake attached to the rear or hindmost car of the train, and a trusty and skillful brakeman stationed upon said car, unless the brakes are efficiently operated by power applied from the locomotive."

Under the facts in the case at bar, this statute has no application. This section is not intended to control the making up of trains in the yard of a railroad company. The making up of a train by a railroad company in its yard at a terminus is not running "upon its railroad a train of cars for the transportation of merchandise or other freight." We can not concede that because the cars being switched in the appellant company's yard were loaded with coal, they were therefore then being used for the "transportation of merchandise" within the meaning of this statute. This section of the statute was evidently intended to apply to trains running from one place or station to another. A few cars being switched about in a freight yard are not a "train" in the sense that word is there used. And clearly this

statute does not in its language purport to apply to the front one of several cars which are being pushed backward in front of an engine. It states specifically that it applies to "the rear or hindmost car of the train." It does not follow that it might not, under some circumstances, be negligence to push cars in front of an engine in a switching yard without the presence of a trusty brakeman upon the first or front car.

The testimony does not show any wanton or reckless conduct on the part of appellant's employes. They, with the deceased, were employed in a very busy yard, and were at a switch which was in frequent use. The engine and cars in question had just passed the deceased, moving south. The witness, McGrath, who was engaged in the same kind of work as deceased, saw the cars moving back north; says he was looking out for them, as he did not want to get caught; that he was further from the front car than deceased was at the time; and that he shouted a warning to deceased.

When deceased was struck he was on the track with his back toward the approaching cars. A switchman was on the north or rear car when the engine and cars were passing south, but as that car passed the switch, he dropped off the car where deceased was standing, and told deceased to look out, as they were going to shove right back. The section of statute above quoted was practically complied with.

We have referred but briefly to some of the testimony. After a careful consideration of all the testimony in the case, in connection with the views expressed by the Supreme and Appellate Courts of this State, we are forced to the conclusion that the deceased lost his life rather from his own negligence than that of any employe of appellant.

But there is another fact to be considered. When the deceased entered the employ of appellant, he assumed the natural and ordinary risks incident to such service. He knew that switching engines and cars were running backward and forward over the tracks and switches where he was working. He assumed the risks to which he was thereby exposed—the dangers incident to the employment.

He undertook to observe all proper care for his own personal safety.

The judgment of the Circuit Court is reversed and the cause remanded.

**Frederick W. Eickhof v. Chicago North Shore St. Ry. Co.
and North Chicago St. R. R. Co.**

1. **INSTRUCTIONS—To Find Defendant Not Guilty—When Proper.**—If the conduct of a party whose duty it is to use care is so clearly and palpably negligent that all reasonable minds would so pronounce it without hesitation or dissent, then the court may instruct the jury to find for the defendant.

2. **NEGLIGENCE—Of the Person Suing for Personal Injuries.**—When a person is injured by ordinary agencies in consequence of passing from one car to another because of the ordinary vibration, or failure to get a firm foothold or grasp, or by losing his hold on the car, or a misstep, or losing his balance, his own negligence would prevent recovery.

3. **ELECTRICITY—Injury by.**—Where the fact is established that an injury is inflicted by escaping electricity, a *prima facie* case of negligence is established.

4. **NEW TRIALS—Presumptions as to Decision of Trial Court.**—The judge who tries a case, and hears all the evidence, is presumed to decide a motion for a new trial in view of all the proof adduced, and it must be presumed that his decision is correct until error is shown.

5. **BILL OF EXCEPTIONS—Where it Does Not Contain all the Evidence.**—Where the bill of exceptions does not purport to contain all of the evidence, the court can not disturb the verdict on the evidence it does contain, even if it is insufficient.

6. **APPELLATE COURT PRACTICE—Instructions Not Considered Where the Bill of Exceptions Does Not Purport to Contain all the Evidence.**—The Appellate Court will not consider the instructions unless all the evidence upon which they were based, is before it.

7. **SAME—Where the Court Will Presume the Evidence Warrants the Finding.**—Where the error assigned, questions the finding of the jury under the evidence before them, all the evidence must be preserved in the bill of exceptions, and it must so state, or the court will presume that there was evidence to warrant the finding.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in the

Eickhof v. Chicago North Shore St. Ry. Co.

Branch Appellate Court of the First District, at the March term, 1898.
Affirmed. Opinion filed July 16, 1898.

CLARK VARNUM, attorney for appellant.

ALEXANDER CLARK, attorney for C. N. S. St. Ry. Co.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellee North Chicago Street Railroad Company.

MR. JUSTICE FREEMAN delivered the opinion of the court.

Where, as in this case, at the close of the plaintiff's testimony, an instruction directing the jury to return a verdict for defendants is given, the question to be considered is, whether the evidence presented tended to prove the averments of the declaration. *Foster v. Wadsworth-Howland Co.*, 168 Ill. 514 (517), and cases there cited.

Appellees' contention is that appellant's evidence, so far as it appears in the record, shows such negligence contributing to the alleged injury as to prevent the latter from recovering, and that the jury were properly instructed to find for the defendants.

Appellant was endeavoring to pass from the foot-board running along the outside of one street car to the foot-board of another, while the train was in motion. He says that he undertook to do this in obedience to what is called in the argument of his counsel "the conductor's orders." But the testimony, so far as it appears in the record, tends to show no such order. At the most it was a statement that if he wished to go down town without paying two fares, he would have to go over to the rear car and get a transfer. But he was not "ordered" to get on the rear car, nor was it intimated that he was expected to do so at any time while the train was in motion. The conductor of that rear car spoke to him when he first got on the car next to the last one of the train, while he was standing on the foot-board and before the train had started; and it was "just starting" according to his own statement, when he was told "to come over and get a transfer." There is nothing

in this to relieve appellant of responsibility for his own action in attempting to pass from one footboard to another while the train was in motion.

The fact which is urged upon our attention, that there was no passage way kept open upon these cars for passengers to go from one car to another, indicates that it was not the expectation nor intention of the companies that this should be done. It did not justify appellant in making use of the footboard for that purpose while the train was in motion. No reason appears why he should not have waited until the cars stopped before making the transfer.

If, in this case, the appellant was injured by ordinary agencies in consequence of thus passing from car to car, if he had slipped and fallen from the train because of the ordinary vibration, or failure to get a firm foothold or grasp, or by losing his hold on the car, or a misstep, or losing his balance, his own negligence would prevent recovery. If the conduct of the party whose duty it is to use care "is so clearly and palpably negligent that all reasonable minds would so pronounce it without hesitation or dissent," then the court may so instruct the jury. *Hoehn v. C. P. & St. L. Ry. Co.*, 152 Ill. 223 (229).

It is also said that the employees of the defendants were negligent in not stopping the train more promptly when appellant called out, as he says he did. But, according to his own statement, he fell from the car and found himself, when the car had stopped, opposite that part of the car, "right where I had been hanging on;" and he says the car ran from the time when he got hold of both hand rails to the time it stopped, about 200 to 250 feet. The testimony does not show, as stated in appellant's brief, that the car ran this distance "without any effort to stop it," and no case of negligence is made out against the defendants in that respect, assuming that the record contains all the evidence.

But it is said that the alleged injuries received by appellant were not approximately caused by any negligence of his own, but by an electric shock received from escaping

electricity when, by placing his hands on the iron railing of the cars, he formed a circuit, and that the escape of such electric current was presumptive proof of negligence.

We have thus far considered the evidence given by appellant himself, which appears in the record. If the evidence presented tended to prove the averment of the declaration to the effect that appellant was injured by the escape of an electrical current through the negligence of the defendants, or either of them, it has been held that such defendant would be chargeable with notice that the electrical apparatus was in a defective condition. (*Burt v. The Douglas Co. St. R. Co.*, 83 Wis. 229-232.) That if the fact was established that injuries were inflicted by escaping electricity, a *prima facie* case of negligence was established. *Tramway v. Reid*, 4 Col. Ct. of Appeals, 53 (62).

But our attention is called to the fact that the bill of exceptions contains no motion for a new trial, although the overruling of such a motion is one of the errors assigned, and there is no certificate to the effect that the bill of exceptions contains all the evidence.

As was said in *Gill v. The People*, 42 Ill. 321, "This record, then, furnishes us with no evidence of which we can take notice that a motion for a new trial was made." See also *Harris v. The People*, 130 Ill. 457.

In *Miner v. Phillips*, 42 Ill. 123, it is said: "The judge who tried the case, having heard all the evidence, is presumed to have decided the motion in view of all the proof adduced on the trial, and it must be presumed that his decision is correct until error is shown. The bill of exceptions not stating that it contains all of the evidence, we can not disturb the verdict on the evidence it does contain, even if it was sufficient. Nor can we perceive any error in giving the instructions. They should always be given in reference to the evidence in the case. On one state of facts, as disclosed by the testimony, an instruction would be strictly proper, while on another state of facts, it would be improper. * * * It is therefore unnecessary to consider the instructions unless we had all the evidence before us upon which they were based."

We regard this language as applicable to the instructions complained of in this case, which directed a verdict in favor of the defendants.

We can not agree with appellant's counsel that it is not necessary in this case for all the evidence to appear. "Where the error assigned questions the finding of the jury under the evidence before them, all the evidence must be preserved in the bill of exceptions, and it must so state, or we will presume the evidence warranted the finding. *Nason v. Letz*, 73 Ill. 371; *I. C. R. R. Co. v. O'Keefe*, 154 Ill. 508.

We must presume the evidence in this case warranted the instructions of the court and the finding of the jury. The judgment of the Circuit Court is affirmed.

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LaBelle B. Vincent v. John M. Stiles.

1. *ARCHITECT'S CERTIFICATE—Where it is Indispensable.*—Where, in a building contract, payment is to be made upon the certificate of an architect, the obtaining of such certificate is a condition precedent and must be strictly complied with. Such compliance or excuse for non-compliance must be averred in the pleading and established by the evidence.

2. *SAME—As a Condition Precedent—Must be Averred, etc.*—The obtaining or presentation of such a certificate is a condition precedent to the right to require payment, and that such condition must be strictly complied with, or else a good and sufficient excuse shown for non-compliance therewith. Such compliance with the condition precedent, or excuse for non-compliance, must be averred in the pleadings and established by the evidence.

Assumpsit, for balance upon a building contract. Trial in the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the October term, 1897. Reversed and remanded. Opinion filed July 16, 1898.

LINDEN & DEMPSEY, attorneys for appellant.

CONSIDER H. WILLETT and PEASE & ALLEN, attorneys for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

This suit was commenced by appellee to recover an amount which he claimed was the balance in full due to him upon a contract for the erection of a building for appellant. The suit is in assumpsit, and the declaration contains the common counts only. The plea is general issue with affidavit of good defense on the merits.

Upon the trial it appeared that there was a written contract between the parties whereby appellee agreed to furnish all the material and do the work of painting and glazing, of the character and kind and within the time mentioned in said contract, "to the full and complete satisfaction" of Horatio R. Wilson, architect. In and by said contract appellant agreed as follows, viz.: "To pay to said party of the first part (appellee) the sum of eleven hundred and forty-five dollars (\$1,145) on certificates of said architect and superintendent as the work progresses, to wit, eighty-five per cent of the estimated value of the same, and the remainder on the satisfactory completion and acceptance by said architect and superintendent of the entire work after the expiration of thirty days, provided said first party shall first furnish all receipts, vouchers and statements required by State and municipal laws and ordinances if so required to do."

Said contract also contains the following: "It is further agreed that in case any difference of opinion shall arise between said parties in relation to the contract, the work to be performed under it or in relation to the plans, drawings and specifications hereto attached, the decision of Horatio R. Wilson, the architect, shall be final and binding on all parties hereto."

No certificate by the architect was produced. There is no averment in the pleadings referring to said contract, and no averment as to said architect or as to any reason why a certificate from him is not procured. On behalf of appellant this point is presented in the brief, viz.:

"Where, in a building contract, payment is to be made upon certificate of architect, the obtaining of such certificate

is a condition precedent and must be strictly complied with. Such compliance or excuse for non-compliance must be averred in the pleading and established by the evidence."

This point is well taken. In *Michaelis v. Wolf*, 136 Ill. 68-71, the provision of the contract was similar to the one above quoted. It is there held, as has been frequently held by that court, that the obtaining or presentation of such a certificate is a condition precedent to the right to require payment, and that "such condition must be strictly complied with, or else a good and sufficient excuse shown for non-compliance therewith. Such compliance with the condition precedent, or excuse for non-compliance, must be averred in the pleadings and established by the evidence."

In that case the issue was distinctly made of the want of a proper averment in the pleadings. Indeed the only point made by appellee, so far as shown in the report of the case, was that "the bill should have averred the issuing of the architect's certificates, or that they were fraudulently withheld by the architect." See also *Wolf v. Michaelis*, 27 Ill. App. 337; *Scoville v. Miller*, 40 Ill. App. 237-241.

It is urged by appellee that under *Fowler v. Deakman*, 84 Ill. 130, appellee could introduce testimony excusing the production of the architect's certificates. If it be a fact that there is an irreconcilable conflict between the *Michaelis* case and the *Fowler* case, we prefer to follow the former for two reasons: first, it is the more recent and should therefore control; second, it is in accord with our own convictions as to good pleading. It is a general principle in pleading, almost, if not quite, without exception, that a charge of fraud must be specially pleaded, and the facts which, it is claimed, constitute the fraud, be fully stated. We see no reason why the case at bar should be held to be an exception to that rule.

As this case must be tried again, we omit any discussion of the questions of fact appearing in the record.

For the reason stated the judgment of the Circuit Court is reversed and the cause remanded.

John Techen v. John Hoffmeyer.

1. **FINAL ORDER—*What is Not.***—An order of the court denying a motion to amend the return of the original summons, and for an alias summons to issue forthwith, is not a final or appealable order.

Appeal from an Order of the Superior Court of Cook County, denying a motion to amend the summons, etc.; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in this court at the October term, 1897. Dismissed. Opinion filed July 16, 1898.

FRANCIS T. MURPHY, attorney for appellant.

S. P. DOUTHART, attorney for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

There is no final or appealable order in this case. The only errors assigned are:

"1. The court erred in setting aside and vacating the order of August 6, 1896, granting an alias summons.

"2. The court erred in refusing to grant plaintiff's motion to amend the original writ of summons and for an alias summons."

These refer to the last order entered in the court below. It is not contended that this is a final order. The only argument of counsel for appellant is that it would be a hardship upon appellant if this appeal be not sustained.

Upon the trial it developed that there were two men, father and son, whose names were the same except the middle initial, and that summons was served upon the wrong man. Thereupon, and on motion of appellant, a juror was withdrawn and the cause continued. Afterward appellant, in writing, moved the court to amend the return on the original summons, and that an alias summons issue forthwith. July 6th, and of the July term, 1896, this motion was argued, and the court announced orally that said motion was denied. No order was entered of record in pursuance of said oral opinion. August 6, 1896, during

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the summer vacation, appellant, by his attorney, appeared before another judge of the Superior Court and obtained an order that an alias summons issue. No notice of this motion to either appellee or his attorney appears in the record. Attorney for appellee may therefore be justified in stating, as he does in his brief, that such order was obtained without any such notice. Afterward the judge who had given said verbal opinion in said cause set aside said order of August 6, 1896, and quashed said alias summons, but granted to appellant leave to renew said motion, and said motion was so renewed. Afterward, by order entered March 6, 1897, said motion so renewed was denied. It is from this last order that this appeal is prosecuted.

From this recitation it will be seen that there is no appealable order in the case. The case is pending in the Superior Court now as fully for all purposes as it ever was.

The appeal from the Superior Court is dismissed.

77	204
79	632
77	204
192	1318
77	204
99	1169
77	204
113	7292

Chicago Athletic Association v. Eddy Electric Mfg. Co., for use, etc.

1. **INSTRUCTIONS—Must Give all the Conditions for a Recovery.**—An instruction which purports to tell the jury under what conditions a recovery may be had, must give all of the conditions essential to right of recovery.

2. **SAME—Permitting the Jury to Regard What is a Substantial Compliance with a Contract.**—An instruction which permits the jury to regard a substantial compliance with the provisions of a contract and specifications as equivalent to a complete performance, and to award a recovery thereon, without limitation as to amount, is erroneous.

3. **ARCHITECT'S CERTIFICATES—When a Condition Precedent.**—In the absence of fraud or refusal to act on the part of the architect, or of a waiver by the parties, the certificate of the architect is to be held as a condition precedent to recovery of the contract price when the terms of the contract so stipulate.

4. **SAME—Where He is a Member of the Board of the Contracting Party.**—The mere fact that the architect was, at the time of making a building contract, a member of the board of directors of one of the con-

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tracting parties does not of itself annul the provisions of the contract requiring his approval.

5. **BUILDING CONTRACTS—Certificate of Engineer, When Final.**—Where the stipulation in a building contract provides that the engineer's estimate and classification shall be final, the fact that he was a stockholder in the contracting party, does not, of itself, render him incompetent to act.

6. **SAME—Excuse for Not Obtaining an Architect's Certificate.**—The question of whether the conduct of the architect was such as to excuse a party from obtaining a certificate, is one dependent upon all the facts and for the determination of the jury; and the former membership of the architect in the board of directors of one of the contracting parties is not conclusive as to this question.

7. **PRACTICE—Tendering an Unreasonable Number of Instructions.**—Where a party litigant tendered to the court eighty-four instructions, it was held to be an unfair and improper burden cast upon the trial court, and it would have been fully justified in refusing them all without examination, and preparing and giving, of its own motion, in lieu thereof, an instruction covering the theory of defense.

8. **SAME—Demurrer, When Waived.**—A demurrer to the declaration is waived by filing a plea of the general issue.

Assumpsit.—Balance due on contract for furnishing electric lighting machinery, etc. Trial in the Superior Court of Cook County; the Hon. WILLIAM C. EWING, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the March term, 1898. Reversed and remanded. Opinion filed June 29, 1898.

STATEMENT.

This suit was brought by appellee for the use, etc., against appellant to recover a balance claimed on contract for furnishing an electric lighting plant and electric signaling devices for the building of appellant, and also for certain extras claimed, and also for value of certain labor and material claimed to have been made necessary by appellant, aside from the contract work and extras.

Written contracts were made and specifications agreed upon for the construction of the plant. The contract provided for payment upon certificates of the architect, and upon sufficient evidence that all claims for work and materials were discharged. The specifications provided that the plant should be accepted by the city electrician before final test by the architect. The final test by architect is provided for as follows:

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"Upon completion of this plant, a careful and impartial test shall be made to extend through a period of thirty days. This test shall be made by actually running all the dynamos, by furnishing current to all the lamps in the building under every possible condition. At the end of this time, if the plant shall have proved satisfactory, and to have conformed to these specifications in every respect, the plant shall be accepted, this contractor replacing all lamps that have been broken during the test. If not found equal to the requirements, the contractor shall make the necessary corrections and improvements until the same shall have been made acceptable to the architect."

Upon the trial it was contended by appellant that appellee had failed to comply with the terms of the contract; that the dynamos furnished were insufficient and defective; that no test was made by the city electrician; that no final test was made by the architect, as provided; that no certificate was obtained from architect that the payments sued for were due; that appellant was obliged to remove the dynamos furnished and supply others; that the cost to appellant of making good the failure of appellee to comply with the contract was more than \$10,000. Appellant contended that the balance, which would have been due to the appellee, if the contract had been fulfilled, was \$6,322.60, and that by reason of such necessary outlay upon its part, there was a balance due it from appellee of \$4,309.36, for which it made claim by way of set-off. On the other hand, appellee contended that the balance due upon contract price, together with extras and other necessary labor and materials, amounted to \$8,310.93, upon which they claimed interest. Appellee claimed to have fully performed the terms of the contract; to have secured the approval of a city inspector; to have submitted to a test sufficient to comply with provisions of contract, and to have in all respects fully performed, except as to procuring the architect's certificate. This it undertook to excuse by showing that the architect was a stockholder and director of appellant when named in the contract, and that this fact was unknown to appellee when the contract was made.

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The trial resulted in a verdict for appellee for \$4,096.10. From judgment upon this verdict the appeal here is prosecuted.

PRUSSING & McCULLOCH, attorneys for appellant.

FREDERICK W. JOB, attorney for appellee; CHURCH & McMURDY, of counsel.

MR. JUSTICE SEARS delivered the opinion of the court.

Upon the trial of this cause a large amount of conflicting evidence was heard on the issues of fact presented. Inasmuch as the determination of questions of law make it necessary that another trial should be had, we refrain from comment, except where unavoidable, upon the facts. Certain instructions tendered by appellee and given by the court are assigned as error. The first of these instructions is in effect that in the event of certain actions by the architect, then the refusal of the architect to approve and accept plant would not preclude recovery, and in such case if the work done and materials furnished were "in good faith and substantially in accordance with requirements of the contract and specifications," the appellee might recover in absence of approval of architect.

It is contended, and we think correctly, that this instruction was faulty, in that it omitted as an element essential to recovery, the proving of acceptance by city electrician and submission to the thirty day test provided for in the contract. There was a conflict in the evidence as to the performance of these stipulated requirements.

An instruction which purports to tell the jury under what conditions a recovery may be had, must give all the conditions essential to right of recovery. *C., B. & Q. R. R. Co. v. Griffin*, 68 Ill. 499; *The St. L. & S. Ry. Co. v. Britz*, 72 Id. 256; *Evans v. George*, 80 Id. 51; *City v. Schmidt*, 107 Id. 186; *Craig v. Miller*, 133 Id. 300; *Pardridge v. Cutler*, 168 Id. 504.

The instruction is also incorrect in permitting the jury to

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regard a "substantial" compliance with the provisions of the contract and specifications as equivalent to a complete performance, and to award a recovery thereon, without limitation as to amount. *Taylor v. Beck*, 13 Ill. 376; *Estep v. Fenton*, 66 Id. 467; *Keeler v. Herr*, 157 Id. 57.

In the latter case the court said: "We think the instructions are erroneous, both because they allow plaintiffs to recover the full contract price upon proof of a 'substantial performance' of their contract, and," etc.

The second instruction is as follows:

"The court instructs the jury that it is an admitted fact in this case that at the time the plaintiff entered into the original contract with the defendant of May 25, 1892, and also on the date of the supplemental contract indorsed upon the first contract, whereby the sum of \$8,367 was added to the price named in the original contract, Henry Ives Cobb, the architect named in that contract, was a member of the board of governors of the Chicago Athletic Association. If, therefore, the jury believe from the evidence that at the time these contracts were made, neither the plaintiff nor Kohler Bros., its agents, by whom said contracts were made, was aware that said Henry Ives Cobb was a member of the board of governors of the Chicago Athletic Association, then the plaintiff was not bound in this case to procure any certificate from said architect as a condition precedent to its right of recovery in this suit, nor is the plaintiff bound by any of the provisions of the contract which required the plaintiff to complete the work therein contracted for to the satisfaction of the architect, or to submit to the decision of said architect any question arising during the progress of the work or in the settlement of the accounts touching the same, or any test of the operation of the plant."

It appears from the evidence that Cobb, the architect named in the contract, was a member of the board of directors or governors of appellant at the time of the making of the contract, but that he had resigned his membership in the board April, 1894. The appellee, on July 25, 1894, wrote to the architect as follows:

“CHICAGO, July 25, 1894.

HENRY IVES COBB, Esq.,

Pursuant to the terms of a contract between the Chicago Athletic Association and the Eddy Electric Manufacturing Company, dated the 25th day of May, 1892, and the addition thereto made and entered into by said parties, after the fire of November 1, 1892, at the club house of said Chicago Athletic Association, we now notify you that the work under said contract has been fully completed by us; that the terms and conditions of said contract have been complied with by us, and we hereby demand of you your certificate as the architect of said building, certifying that said contract has been completed and the work thereunder, including the necessary extras, has been fully performed by us.

We hand you herewith a statement showing the balance due on the original contract, the amount due for extras ordered and O K'd by you, Mr. Macomber, and the extras under the heading 'Extra expense Chicago Athletic Association,' the total sum of which is eighty-six hundred and 8-100 (\$8,600.08) dollars.

Yours truly,

EDDY ELECTRIC MANUFACTURING COMPANY,

(Signed)

By KOHLER BROS.”

At the time, therefore, when the architect was called upon to act as to acceptance of the plant, he was no longer a member of the board.

The question presented in passing upon this instruction is whether the fact that the architect named in the contract had been a director of the appellant corporation at the time of making contract, such fact having been unknown to appellee when contract was made, would of itself invalidate the provisions of the contract as to procuring certificate of such architect as condition precedent to payment of contract price, even though no fraudulent action of the architect appear, and he had ceased to be a member of the board when his certificate was required.

It is settled by a long line of decisions of this State that

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in the absence of fraud or refusal to act on the part of the architect, or of waiver by parties, the certificate of the architect is to be held as a condition precedent to recovery of contract price when the terms of the contract so stipulate. In other words, such provisions of building contracts are enforced by the courts. The instruction here would make the fact of the prior membership in the board of directors of appellant a disqualification of the architect and *per se* an excuse to the contractor for failure to procure certificate, irrespective of whether there was any fraud on the part of the architect or a refusal to act. We are of opinion that the fact of the former membership of Mr. Cobb in appellant's board of directors did not, of itself, operate to annul all those provisions of the contract requiring the approval of the architect. *Kidwell v. B. & O. R. R. Co.*, 11 Gratt. 676; *Williams v. C., S. F. & C. Ry. Co.*, 112 Mo. 463; *Ranger v. G. W. Ry. Co.*, 5 H. of L. Cases, 71; *N. Co. v. Fenlon*, 4 Watts & S. 205.

In *Kidwell v. B. & O. R. R. Co.*, *supra*, the court said:

"The final estimates, as before stated, were made by the resident engineers and concurred in by Atkinson, the division engineer. I do not think their validity is affected by the fact that when they were made Latrobe had been a stockholder, and Atkinson was a stockholder in the character of trustee for another, without having, himself, any interest in the subject. Whether, if they had been made by an engineer who, at the time of making them, was a stockholder in his own right, they would have been invalid merely on that ground and in the absence of fraud, is a question which does not arise, and is, therefore, not intended to be decided."

In *Williams v. C. S. F. & C. Ry. Co.*, *supra*, the court said:

"It should be further noted that plaintiffs complained that Mr. Robinson, the chief engineer, was an officer and stockholder of defendant. * * * The stipulation in the contract that the engineer's estimate and classification should be final, is valid and binding, and has the sanction

of the courts in England and the different States of the Union and the Federal courts. * * * And it is equally well settled that the fact that the chief engineer was also a stockholder does not, of itself, render the submission to him invalid. The argument made by the plaintiffs that the duties confided to the engineer are essentially judicial, and, being a stockholder himself, he is thus made a judge in his own case, was met in the case of *Ranger v. Railway Co.*, 5 H. L. Cas. 88."

In *Ranger v. G. W. Ry. Co.*, *supra*, the court said: "The next ground on which he rests his title to relief is, that Mr. Brunel, the principal engineer of the company, on whose decision many matters were, by the terms of the contract, made to depend, was incapacitated from acting in the discharge of the duties imposed on him, by reason of his being himself a shareholder in the company. * * * He was, in truth, made the absolute judge, during the progress of the works, of the mode in which the appellant was discharging his duties; he was to decide how much of the contract price of 63,028 pounds, from time to time, had become payable, and how much was due for extra works; and from his decision, so far, there was no appeal. * * * The contention now made by the appellant is, that the duties thus confided to the principal engineer were of a judicial nature; that Mr. Brunel was the principal engineer by whom these duties were to be performed, and that he was himself a shareholder in the company; that he was thus made a judge or arbitrator in what was, in effect, his own cause. That until the month of July, 1838, the appellant was unaware of the fact of Mr. Brunel having any interest in the company, except as the engineer, and so ought not to be bound by any of his decisions. * * * But here the whole tenor of the contract shows it was never intended that the engineer should be indifferent. When it is stipulated that certain questions shall be decided by the engineer appointed by the company, this is, in fact, a stipulation that they shall be decided by the company. * * * The company's engineer was not intended to be an impartial judge,

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but the organ of one of the contracting parties. * * * I think it is quite enough if they (the engineer's estimates) were made *bona fide*, and with the intention of acting according to the exigency of the terms of the contract."

The question of whether the conduct of the architect was such as to excuse appellee from the requirement to obtain a certificate, was one dependent upon all the facts and for the determination of the jury; and the former membership of the architect in appellant's board of directors was not, as matter of law, conclusive as to this question.

The third instruction is bad, in that it assumes a controverted fact, viz., that the plant had been placed in appellant's building prior to August, 1893. It is no answer to this objection to say that it was uncontroverted that some part of the plant specified had at that time been constructed. That the plant, as an entirety and in compliance with the terms of the contract and specifications, had then been constructed, was very sharply controverted. This instruction is also subject to criticism as amounting to a direction to the jury to regard certain facts as conclusive of the question of appellee's excuse from procuring the certificate.

The fourth instruction is subject to the same objection as the first, in permitting the jury to regard substantial fulfillment of the requirements of the contract as sufficient to warrant a recovery without limitation as to amount. The instruction does not in terms direct that the jury might in such case award the full contract price, but they would be very likely to be misled into such view by the language of the instruction.

The fifth, sixth, seventh and eighth instructions are subject to this same objection.

It is also contended by counsel for appellant that the trial court erred in refusing certain instructions tendered by appellant. We shall not undertake to pass upon this contention. There were eighty-four instructions tendered by appellant. This was an unfair and improper burden cast upon the trial court. That court would have been fully justified in refusing them all without examination upon the

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ground of the unreasonable number, and upon preparing and giving, of its own motion, in lieu thereof, an instruction covering the theory of defense.

Counsel discuss in their briefs the demurrer to the thirteenth count of the declaration. It appears, however, from the abstract, that the demurrer was waived by plea of general issue filed January 30, 1896.

For errors in the giving of instructions tendered by appellee, as above noted, the judgment is reversed and cause remanded.

Carl Corper Brewing and Malting Co. v. Minwegen & Weiss Manufacturing Co.

1. CONSPIRACY—*One Person Can Not be Guilty.*—One person alone can not be guilty of a conspiracy.

Malicious Prosecution of Civil Suits.—Trial in the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Judgment for defendant on demurrer to declaration. Appeal by plaintiff. Heard in the Branch Appellate Court of the First District, at the March term, 1898. Affirmed. Opinion filed July 17, 1898.

LACKNER & BUTZ, attorneys for appellant.

JONES & LUSK and HENRY FRANKFURTER, attorneys for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

As stated by appellee, the brief for appellant is "a model of conciseness." It contains but little more than one page. It cites the case of *Payne v. Donagan*, 9 Ill. App. 566, and says: "If the decision of this court in that case was right then the decision of his honor (the Circuit Judge) in the case at bar was wrong. There is no distinction between the cases."

In some respects the two cases are substantially the same. In each case the suit was brought to recover for damages alleged to have been suffered by reason of defendants having wrongfully, maliciously, and without probable cause,

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instituted a succession of civil suits before justices of the peace, etc. In each case a general demurrer to the declaration was sustained in the court below, and judgment entered against appellant for costs.

There are, however, material differences in the declarations. In the *Payne* case there were several defendants. The declaration specifically charged conspiracy between the defendants to injure and extort money from the plaintiff; that defendants brought three different suits before a justice of the peace at Blue Island, and allowed them to be dismissed without prosecution when plaintiff appeared to defend; and that in all of said suits plaintiff was summoned to appear before a justice of the peace at a great distance (over twenty miles) from where "all the parties resided and did business."

In the case at bar there is no charge of conspiracy. There is no statement implicating any person or corporation, except the defendant corporation. The defendant could not alone be guilty of a conspiracy, even if it be conceded that a corporation can conspire. The charge of conspiracy in the *Payne* case is the gist of the action, and presents a material and important distinction between that case and the case at bar.

In the case at bar the averment is that the suits were instituted before a justice of the peace whose office is seven miles from the "residence and place of business" of appellant, which is an Illinois corporation. Appellant is as much a resident of one part of the city of Chicago as it is of any other part. It is no evidence of wrongful purpose or intent for a party to commence suit before a justice of the peace whose office is most convenient to the plaintiff, even though it be not as convenient to the defendant as the office of some other justice of the peace may have been. Suits are not supposed to be brought for the convenience of defendants.

In the *Payne* case it is charged that the suits were all before a justice of the peace at Blue Island, a great distance from the residence of all parties. In the case at bar there is no similar averment. There are other differences between

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these declarations, but we have said enough to show that there are material distinctions, and that the Payne case is not conclusive as to the case at bar.

If reports be correct, there have been cases in this county where not only the plaintiff in justice of the peace suits, but the attorney and the justice of the peace, should all be prosecuted both criminally and civilly. So far as appears from the declaration, this is not, however, such a case.

There was no error in sustaining the demurrer to the declaration.

The judgment of the Circuit Court is affirmed.

Chicago City Railway Co. v. Ellen Meehan.

1. INSTRUCTIONS—*Where the Evidence is Conflicting*.—In cases where the testimony is conflicting the instructions should be accurate, clear and perspicuous.

2. ORDINARY CARE—*What Constitutes*.—What constitutes ordinary care depends upon the conduct of the party under all the facts, circumstances, disadvantages and disabilities.

3. CONTRIBUTORY NEGLIGENCE—*No Recovery Where it Exists*.—There can be no recovery if the plaintiff's negligence contributed in any degree to the injury.

4. SAME—*Stepping from a Car in Motion*.—The question as to whether stepping from a street car while in motion is negligence depends upon the person who does the stepping, and all the facts and circumstances surrounding the case.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in the Branch Appellate Court of the First District, at the March term, 1898. Reversed and remanded. Opinion filed July 16, 1898.

W. J. HYNES and E. R. BLISS, attorneys for appellant.

C. S. O'MEARA, attorney for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

This action was commenced by appellee to recover from appellant damages for injuries alleged to have been

received by appellee in alighting from a cable car on State street in the city of Chicago. The accident occurred at or near the intersection of Twenty-ninth and State streets June 11, 1895. At the trial the jury returned a verdict in favor of appellee. A motion by appellant for a new trial was overruled and judgment was entered upon the verdict, and the case is brought to this court by appeal.

The testimony is very conflicting. Had the verdict been for appellant it certainly could not have been set aside upon the ground that it was contrary to the evidence. It was therefore necessary that the instructions should be accurate, clear and perspicuous. *Wolff v. Miles*, 16 Ill. App. 533. They should not only state the law accurately, but should also be applicable to the evidence. *Peoria, D. & E. Ry. Co. v. Wagner*, 18 Ill. App. 598. The deliberations of the jury should not be influenced by improper instructions. *Shaw v. People*, 81 Ill. 150; *Cushman v. Cogswell*, 86 Ill. 62; *Chicago City Ry. Co. v. Canevin*, Ill. App., October term, First District, and cases there cited.

The court refused to give instructions No. 6 and No. 9, as requested by appellant, but gave them as modified by the court. Those instructions, as given, are as follows (the modifications made by the court appearing in parentheses in italics):

"No. 6. The jury are instructed that if it appears from the evidence in this case that the plaintiff left her seat and got down upon the running-board of the car upon which she was riding while the same was going, and that she either stepped or slipped off said car while it was in motion (*under circumstances which would necessarily or probably render such an act dangerous*), and fell in the street, and that in so doing she was guilty of a want of ordinary care for her own safety, and that by such conduct on her part contributed to the injury by reason of which she suffered the injury complained of, then the jury are entitled under the pleading in this case, to find for the defendant."

"No. 9. The jury are instructed that if they find from the evidence that the plaintiff, without any warning or

notice to the defendant's servants on the occasion in question, and without asking or waiting for the defendant to give her an opportunity to safely alight from said car, either jumped or stepped from said car (*while the car was in motion, and not at a regular stopping place, under the circumstances which would necessarily or probably render such an act dangerous*), and was injured as complained, and if they believe such conduct on her part was a want of ordinary care for her own safety, then the plaintiff can not recover in this."

Whether these instructions should have been given as presented by appellant it is not necessary now to inquire. They should not have been given as modified. On behalf of appellee it was contended upon the trial that she alighted at a regular stopping place; that the car had stopped and was standing still; and that as she was in the act of stepping from the car while it was standing still, it was suddenly and without warning started forward, and that she was thereby thrown to the street and injured.

On the part of appellant it was claimed at the trial that appellee did not step from the car at a regular stopping place; that the car had not stopped, but was still in motion at the time appellee stepped off; and that the car did not stop or come to a standstill until after appellee had stepped off and had fallen.

It would not be contended that appellee could recover if she was injured by reason of her having carelessly stepped off the car while it was in motion and not at a regular stopping place. That would be such a want of ordinary care on her part that she could not recover damages for the injury sustained.

The court's modification of the ninth instruction was so worded as to be likely to give to the jury the impression that it might not be negligence to alight from a car while it was in motion if it was at a regular stopping place. It is usually want of ordinary care to step off a car while it is moving, and it makes but little difference whether it is or is not at a regular stopping place. It must be kept in mind

that there is a very sharp conflict in the testimony as to whether the accident occurred at a regular stopping place. If the jury came to the conclusion from the testimony that this accident in fact was at a regular stopping place, then they might understand from this instruction that plaintiff could recover, although she stepped from the car while it was in motion.

The car in question is what is called an open car. There was a foot-board the whole length of the car, and a passenger can step from any seat in the car to the foot-board and from that to the street. A passenger could thus leave the car without passing the conductor. There are posts or handle-bars so placed that a person alighting may hold on to one of them. Appellee testifies that when she stepped off the car she was facing south; that the car was going north, and that her face was toward the rear end of the train.

We do not say that it is always negligence for a person to alight from a car with the back toward the front end of the train. But by the modifications made by the court, the manner of getting off the car is ignored. Even if it be considered that under such circumstances it would not be negligence or want of ordinary care for a young man in sound, physical condition and vigor to jump or step from a car while it is in motion and not at a regular stopping place, yet it might be negligence and show an absolute want of ordinary care for a woman, under the same circumstances, to step or jump from a moving car with her back toward the front end of the train. In alighting from a moving car in the manner indicated, a woman would usually be laboring under a serious disadvantage by reason of her mode of dress. But what constitutes ordinary care depends upon the conduct of the party under all the facts, circumstances, disadvantages and disabilities. Again, even though it be conceded that a vigorous and active young man, having both feet, might, under the same circumstances, jump from a car while it is in motion and not at a regular stopping place, yet it might, under the same circumstances, be negligence

for a man with but one foot to jump from a car at any place while it was in motion, or at any time, unless under some extraordinary circumstances.

"The rule is well settled by numerous adjudications that there can be no recovery if the plaintiff's negligence contributed in any degree to the injury." For an exhaustive consideration of this question and review of authorities, see *Chicago City Ry. Co. v. Canevin*, cited above.

The facts in that case were quite similar to the facts in the case at bar. An instruction was asked by the defendant which was very like the instructions now under consideration. The trial court modified the instruction in that case by inserting the word "materially," thus making it say that if the conduct on the part of the plaintiff "was a want of ordinary care for her own safety which materially contributed to the injury complained of," she could not recover. That was held to be error upon the settled principle that if plaintiff had "contributed in any degree to the injury," she could not recover, and that to say that she must have contributed materially was not consistent with the settled doctrine as to contributory negligence.

The natural and ordinary meaning of the modification of these instructions is that even though appellee was in fact negligent, or did not, in fact, use ordinary care for her own safety, yet, if the circumstances were such that her act would not necessarily or probably be dangerous, she could recover. That is not the law. The question is not whether any particular conduct on her part would necessarily or probably be dangerous, but did she, under all the circumstances, use ordinary care for her own safety.

There were no extraordinary circumstances attending the situation of this train. There was no impending danger to the car in which appellee was riding. There was nothing calling for unusual haste; nothing tending to distract the attention of appellee; no unusual cause for excitement; nothing indicating any necessity for leaving the car at any other than the regular stopping place while it was standing still. Neither does it appear from the testimony, that

appellee had any excuse for stepping or jumping off the car with her face toward the rear of the train. If she, in fact, "either jumped or stepped from said car and was injured as complained." and if under all the facts and circumstances shown by the testimony "such conduct on her part was a want of ordinary care for her own safety," then the jury should not have been restricted, as was done by the modifications in question. If appellee alighted from the car while it was in motion and not at a regular stopping place, when there was no necessity for so doing, or if she alighted in a careless manner, then she took upon herself the responsibility of the consequences of her act. It would then be immaterial, so far as liability of appellant is involved, whether the circumstances were such as "would necessarily or probably render such an act dangerous." The question is, was the act of appellee such, or was it done in such a manner, as to show a want of ordinary care for her own safety.

The ninth instruction, as modified, would ordinarily be understood to state the law to be that appellee might recover, notwithstanding her own negligent act or want of ordinary care may have contributed to the injury, provided the surrounding circumstances were such that the act would not necessarily or probably be dangerous. That is not the law.

As this case must be remanded for a new trial we refrain from expressing any opinion as to the question of fact involved.

The judgment of the Superior Court is reversed and the cause remanded.

Henry Ording, Jr., v. William H. Burnet.

1. PRACTICE—*Prima Facie Case*.—In foreclosing a trust deed the complainant makes out a *prima facie* case by producing the notes and deed of trust.

Foreclosure.—Trust deed. Trial in the Circuit Court, Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Hearing and decree

Dorn v. Lawrence.

for complainant. Appeal by defendant. Heard in the Branch Appellate Court of the First District, at the March term, 1898. Affirmed. Opinion filed July 16, 1898.

CHARLES PICKLER, attorney for appellant.

OLIVER & MECARTNEY, attorneys for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This is a foreclosure suit, in which the notes secured by the trust deed were introduced in evidence. The master reported the amount of principal and interest due according to the tenor and effect of the said notes, and a decree was entered accordingly and sale of the premises ordered. The complainant made out a *prima facie* case by producing the notes and deed of trust. *Douglas v. Pfeiffer et al.*, 46 Ill. 102, 106.

No testimony was offered in behalf of appellant. Interest was properly allowed, and there is no claim it was not correctly calculated.

This appeal appears to have been prosecuted only for delay. The decree of the Circuit Court is affirmed.

G. Dorn v. Elizabeth Lawrence.

1. VARIANCE — *Judgment, etc.*—The court affirmed the decree for reasons stated in the opinion.

Appeal, from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in the Branch Appellate Court of the First District, at the March term, 1898. Affirmed. Opinion filed July, 16, 1898.

CHARLES PICKLER, attorney for appellant.

MARSTON, AUGUR & TUTTLE, attorneys for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court. The propriety of this appeal is more than questionable.

The bill was filed to foreclose a trust deed, securing a note for \$5,000. After the bill was filed, a payment of \$3,000 was made, and the bill dismissed as to part of the property without prejudice to complainant's right to prosecute the bill and foreclose as to the remainder, which was done.

The answer filed by the defendant itself sets up the payment of the \$3,000 since the filing of the bill.

It is claimed that the decree does not support the allegations of the bill, because it finds the balance of the note, principal and interest, due, instead of the original sum claimed in the bill, and makes it a lien upon the remainder of the property, and that thus there is a fatal variance.

The decree is affirmed.

G. Dorn and Annetta Rivera v. Peter Van Vlissingen.

1. *APPEAL—Dismissed.*—In this case the court dismisses the appeal for reasons stated in the opinion.

Appeal, from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in the Branch Appellate Court of the First District, at the March term, 1898. Appeal dismissed. Opinion filed July 16, 1898.

CHARLES PICKLER, attorney for appellant.

WILLIAM W. CASE, attorney for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

The so-called "Argument and Brief" for appellants in this case, consists of naming the numerous pleadings filed; a statement that "a bill of exceptions is unnecessary," and the argument for appellant, which we here present in full, viz.:

"It is respectfully contended that the judgment of the lower court must be reversed and the cause remanded with instructions."

Dorn v. Ross.

Counsel for appellee commences his brief thus: "In the brief filed by appellants in this cause, counsel merely seeks to trifle with this court as he has trifled for months with the court below;" and concludes his brief thus: "Appellee therefore prays that the judgment of the Circuit Court may be affirmed, with statutory damages."

We do not feel it to be necessary to express any opinion as to the opening sentence of appellee's brief, but the prayer of the closing sentence is granted.

Let the appeal be dismissed at appellant's cost, with statutory damages.

77	223
83	442
177	225

G. Dorn v. Isom Ross et al.

1. **WAIVER—Of Error Assigned.**—All assignments of error not mentioned in the appellant's brief are waived.

2. **ABSTRACT—Should be More than a Mere Index.**—An abstract which is little more than a mere index to the record is not a compliance with Rule 18 of this court, which requires that a party bringing a cause into this court, shall furnish a complete abstract or abridgment of the record.

In Equity.—Foreclosure of trust deed. Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Hearing and decree for complainant. Appeal by defendant. Heard in this court at the October term, 1897. Affirmed. Opinion filed June 18, 1898.

CHARLES PICKLER, attorney for appellant.

MANN, HAYES & MILLER, attorneys for appellees.

MR. JUSTICE WINDES delivered the opinion of the court.

Isom Ross, the owner of a principal promissory note of \$4,000, made by C. E. Dorn and G. Dorn, payable to their order and by them indorsed, dated October 5, 1892, due in three years after date, bearing interest at six per cent per annum, payable semi-annually, and evidenced by six coupon

notes of \$120 each, and bearing interest at seven per cent per annum after maturity, all secured by a trust deed made by said Dorn to Thomas Scanlan, as trustee, on lots 19 to 24, in block 1, Columbia addition to South Shore, in Cook county, Illinois, together with said Scanlan, filed a bill July 1, 1896, in the Superior Court of Cook County, to foreclose said trust deed against the Dorns and others.

December 18, 1896, the death of said Ross was suggested, and his executor, John B. Ross, was substituted for deceased as a party complainant, and thereafter the cause proceeded in the name of said executor as co-complainant with said Scanlan. The defendants, not defaulted, answered the bill, and after replications filed the cause was referred to the master to take proofs and report the same with his conclusions thereon. The master, after taking evidence, reported it with his conclusions, showing that there was due to said executor on said notes, principal and interest—for taxes paid on said premises and for solicitors, amounting to \$200—in all, the sum of \$4,683.58; that the same was secured to be paid by said trust deed and that complainants were entitled to a decree of foreclosure.

Exceptions to the master's report were overruled, and a decree of foreclosure in accordance with the master's report entered, from which Gay Dorn has appealed. He has made eight assignments of error, but by his brief he claims, first, that there is no evidence that John B. Ross is the executor of Isom Ross; second, that there is no evidence justifying the allowance of \$200 solicitors' fees; third, that there is no evidence showing any amount due on the principal note and coupon; and, fourth, that the witnesses did not sign their depositions before the master, nor were their signatures waived, and their testimony was therefore inadmissible.

We assume that all assignments of error not mentioned in appellant's brief are waived. The abstract made by appellant is little more than an index to the record, and is not a compliance with Rule 18 of this court, which requires that "a party bringing a cause into this court shall furnish a complete abstract or abridgement of the record."

The abstract shows that a note, coupon and trust deed were offered in evidence, also a certified copy of letters testamentary of the will of Isom Ross, of probate and certificate of probate thereof, marked complainants' Exhibit E.; that these documents were objected to, but admitted in evidence. It also shows that the witnesses who testified before the master were sworn to their testimony, except where the signature to the deposition was waived by stipulation of counsel. None of the documents above mentioned are abstracted, nor the objections taken thereto, nor does the abstract state that the documents do not appear in the record; nor does it appear that any objection was made before the master or the court; that depositions of witnesses taken before the master were not signed by the witnesses. No depositions of witnesses are abstracted, while a reference to the record shows that two witnesses testified. The abstract, with regard to the master's report, shows the following:

"Master's report, filed April 22, 1897, finding that on or about October 5, 1892, said Dorns made, executed and delivered the \$4,000 and \$120 notes which afterward became the property of Isom Ross; that said notes were secured by a trust deed conveying the premises described in the bill, the property of Gay Dorn; that subsequent to the beginning of suit Isom Ross died leaving a last will under which John B. Ross was appointed and qualified as executor, and as such executor is now the owner of said two notes; that there is now due such executor \$4,000 principal, and \$434.67 interest thereon, also \$200 solicitor's fees; that a decree be entered accordingly. Dated April 19, 1897. (Note. 'April 19th' is written over the words 'March 11th.')

We are unable to tell from such an abstract whether there was error in any of the respects claimed, and we are not required to search through the transcript of record for errors which, if they were committed, should be made to appear by the abstract.

For failure to file a complete abstract, which shows that

any error was committed in the proceedings before the master or the chancellor, the decree is affirmed. *Gibler v. City of Mattoon*, 167 Ill. 18.

Decree affirmed.

Mr. Justice SEARS took no part in this decision.

Mary Wahl et al. v. Frank Zoelck.

1. **MORTGAGES**—*The Mortgagee Holds Only Such Title as the Mortgagor Had.*—In a proceeding to foreclose a mortgage all that is sought to be subjected to the payment of the indebtedness is whatever title the mortgagors had at the time of executing the mortgage, and the extent of that title is not open to inquiry by the mortgagor in a foreclosure suit.

2. **LACHES**—*In Failing to Enforce a Mortgage.*—A failure to enforce a mortgage indebtedness for a period of nine years after its maturity can not be considered as *laches*.

In Equity.—Foreclosure of trust deed. Trial in the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Hearing and decree for complainant. Appeal by defendants. Heard in this court at the October term, 1897. Affirmed. Opinion filed June 13, 1898.

STATEMENT.

This is a suit to foreclose a trust deed dated April 7, 1885, executed by John Wahl and Mary Wahl, his wife, to secure a promissory note for \$1,300, executed by the same persons. The trust deed was recorded in the recorder's office of Cook county, April 17, 1885.

The bill is in the usual form and alleges that John Wahl, on or about November 6, 1893, died, leaving Mary Wahl, his widow, and certain children, his only heirs-at-law; that the widow and children claim an interest in the premises described in the trust deed by virtue of the death of John Wahl; that the trust deed provided that the sum of \$100 should be paid as attorney's and solicitor's fees in case of

foreclosure of the trust deed, which should be included in the decree. Moses Salomon was made a defendant to the bill as the holder of a certificate of sale issued in a former suit to foreclose a subsequent mortgage on the same premises.

Mary Wahl and Moses Salomon appeared and answered the bill; and the minors appeared by their guardian *ad litem*. The case was referred to a master to take proofs and report the same with his conclusions. The case was heard before the master, and the master made his report, to which appellants filed objections. These objections were overruled by the master, and his report filed in court. By an order of court the objections of appellants before the master were ordered to stand as exceptions to the master's report. The master found that all of the material allegations of the bill were true, and that the claim of the defendant Moses Salomon was junior to the lien of complainant. Upon final hearing by the court, the exceptions were overruled, and a decree entered, finding amount of indebtedness and ordering that unless same be paid by some of defendants within time fixed, the premises be sold, etc.

M. SALOMON, attorney for appellants.

WALTHER & LANAGHEN, attorneys for appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

The only grounds of objection to the decree, presented by the brief of counsel for appellants, are, first, that no title is shown in the makers of the trust deed foreclosed; secondly, that the solicitor's fee of \$100 was improperly allowed; thirdly, that complainant was chargeable with *laches* in enforcing his rights under the trust deed; and fourthly, that Mrs. Wahl was a surety only, and as such executed the note and trust deed to secure a debt of her husband. We are unable to see how any of these contentions can avail appellants.

All that is sought to be subjected to the payment of the

indebtedness is whatever title the mortgagors had, and the extent of that title is not here open to inquiry by appellants. *R. & M. R. R. Co. v. F. L. & T. Co.*, 49 Ill. 331.

The solicitor's fee allowed is covenanted for in the trust deed. The allowance was proper. *Heffron v. Gage*, 149 Ill. 182, wherein the court said: "Here the parties stipulated in the deed the amount that should be paid in default of the payment of the mortgage debt, and no reason is perceived why they should not be concluded by the amount so agreed upon in the mortgage, unless it appears that the amount was inserted as a cover for usury, or is unreasonable or excessive."

The amount here allowed can not be said to be a cover for usury, unreasonable or excessive.

We see no force in the contention that a failure to enforce a mortgage indebtedness for a period of nine years after its maturity should of itself be held to constitute *laches*. It is not contended that the note or trust deed was within the application of the statute of limitations.

The note and trust deed were both executed by Mrs. Wahl as well as by her husband. No defense was interposed which attacked the sufficiency of consideration or execution.

It appears that after the conclusion of the taking of testimony and the master's report, that the master fixed the 3d day of November, 1896, as the time within which to file objections thereto, and that thereafter on December 4, 1896, counsel for appellants offered Mrs. Wahl as a witness, and by motion asked to have her testimony taken. Upon objection by appellee, the master denied this motion. Exception to this ruling of the master was overruled by the trial court. In this there was no error. The proffer of this evidence came too late. Nor is anything shown in the proffer which would have constituted competent and material evidence.

Some objections were made to the rulings in admitting testimony; but they are abandoned in the presentation of the case by briefs here.

Williams v. Williams.

We are unable to accede to the contention of appellant Salomon, presented for the first time here in reply brief, that his lien should be treated as prior to that of the appellee; nor would it have any force if presented earlier. There can be no doubt as to complainant's priority.

The decree is affirmed.

William Williams v. Alice B. Williams.

1. **MARRIED WOMEN—*Separate Maintenance.***—A married woman who, without her fault, lives separate and apart from her husband, may have her remedy in equity against her husband for a reasonable support and maintenance, while she so lives separate and apart. (R. S., Ch. 68, Sec. 22.)

2. **SEPARATE MAINTENANCE—*Condonation as a Bar.***—In this case it was pleaded in bar that the wife had previously filed a sworn bill for divorce for similar reasons, which she had dismissed, and resumed marital relations with her husband. The court after discussing the question of condonation, holds the matter pleaded not a sufficient bar.

3. **CONDONATION—*Will Not be Implied.***—A condonation will not be implied from the conduct of a party while acting under the restraint of fear or the force of circumstances.

4. **MARRIED WOMEN—*When Not Bound to Live with Their Husbands.***—A wife who is not herself in fault, is not bound to live and cohabit with her husband if his conduct is such as to directly endanger her life, peace or health, nor where the husband pursues a persistent, unjustifiable and wrongful course of conduct toward her which will necessarily and inevitably render her life miserable.

Bill for Separate Maintenance.—Trial in the Superior Court of Cook County; the Hon. HENRY V. FREEMAN, Judge, presiding. Hearing and decree for complainant. Appeal by defendant. Heard in this court at the October term, 1897. Affirmed. Opinion filed June 18, 1898.

JOSIAH BURNHAM, attorney for appellant.

P. J. O'SHEA, attorney for appellee.

MR. JUSTICE WINDES delivered the opinion of the court. Appellee filed a bill for separate maintenance against appellant October 19, 1896, in the Superior Court of Cook

County, by which she alleged that she was married to appellant September 17, 1893, lived with him as his wife to May 1, 1896, and faithfully performed all duties as a wife; that some time previous to May 1, 1896, she discovered that appellant had syphilis; that she was fully advised by a reputable physician that the disease was incurable, contagious and polluting to her health if she continued to cohabit with appellant; that upon said date she informed appellant that she would not cohabit with him as his wife any longer because of said disease, and thereupon appellant began to be dissatisfied with her and discontented with his home; that appellant deserted his home September 20, 1896, and has remained elsewhere since that date, for which desertion she is in nowise responsible. The bill prays for a separate maintenance, attorney's fees, alimony *pendente lite*, and for general relief.

Appellant filed a plea in which he set up as a bar to the bill, that on August 7, 1894, appellee filed her sworn bill in the Circuit Court of Cook County against him, in which she made the same allegations and charges as are made in the bill in this case; that the latter bill is still pending and undetermined, and that since said bill was filed in the Circuit Court, appellee has lived with appellant two years and has borne a child by him. On a hearing of the plea it was held insufficient and overruled, and appellant was ruled to answer. Later, and on November 20, 1896, appellant answered the bill, by which he averred that appellee, without cause or excuse, on about July 7, 1894, refused to live with him as his wife, and for the next two months lived apart from him without cause; that on several subsequent occasions she deserted him without cause or excuse, and refused to live with him as his wife for weeks and months at a time; denies that she has faithfully discharged all duties as a wife; denies the allegations of the bill as to said disease; denies desertion without cause, and avers that she has been guilty of extreme and repeated cruelty to him since said marriage; that appellee's bill was not filed in good faith, but solely for the purpose of extorting money from him.

A hearing before the chancellor resulted in a decree finding the allegations of the bill to be true, and decreeing a separate maintenance to appellee, and alimony of \$520 per year, commencing February 1, 1897, payable in semi-monthly installments at the rate of \$10 per week in advance until the further order of the court, and also a solicitor's fee of \$100.

Appellant has appealed and contends that his plea should have been sustained; that if appellee ever had any cause for complaint, she had condoned it by living with him after she filed her first bill, and that even if she filed her second bill in good faith, she did not make out a case for any relief; that she did not show she was living apart from appellant without her fault; and that the alimony is excessive.

It appears from the sworn bill of appellee filed in the Circuit Court, on August 7, 1894, that she, prior to July 7, 1894, knew that appellant was afflicted with a loathsome disease; that on or about that date she consulted a physician in regard to it, and was informed by him that she was in constant danger of contracting the disease from her husband, and that if she continued to live and cohabit with him as his wife, it would be at the risk of her health and life, and that her husband could never be permanently cured of the disease. It further appears from the same bill, that from the time she received this information she refused longer to live and cohabit with her husband, and that after July 7, 1894, she lived separately and apart from her husband. The bill prayed a divorce from appellant. By the present bill it appears that from the time of the marriage, September 20, 1893, until May 1, 1896, appellee lived with her husband as his wife, and faithfully performed all duties as a wife; that some time previous to May 1, 1896, she was fully advised by a reputable physician of the terrible nature of appellant's disease, and that it was incurable, whereupon she refused longer to cohabit with him because of the disease, and he thereafter on September 20, 1896, deserted her. Was the first bill a bar to the second bill? We think not.

In 1 Nelson on Divorce and Separation, Sec. 451, the

author says: "According to a familiar principle of law, a party is not bound by any involuntary act induced by force or fraud. A condemnation will not be implied from the conduct of a plaintiff while acting under the restraint of fear or the force of circumstances. The fear of violence may induce the wife to return to her husband, or to remain with him after he has been guilty of a cause for divorce, but no condonation will be implied from such circumstances." The same author says (Sec. 456): "It is the policy of the law to encourage reconciliation and reunion where the parties are separated on account of the misconduct of one of them. The purpose is evidently to reform the offender. * * * If no reformation is effected by the reunion, and the cruelty is repeated, or the offender commits some other cause for divorce, the injured party loses no rights by the condonation. The former offense is revived." And in Sec. 461: "The doctrine of condonation is that the offender will reform and will commit no matrimonial offense. If any offense is committed the injured party is entitled to all the relief she could have obtained if she had not condoned the offense; otherwise, she will suffer for her rightful conduct in condoning the offense." The statements of this text are reasonable and are supported by respectable authority. The nature of appellant's offense is such as to be continuing—a constant menace to his wife's health in case of cohabitation. In her first bill she alleged that she had been informed that her husband could not be permanently cured, and for aught that appears from these pleadings, she may have lived with him subsequently to the filing of that bill, as his wife, because he had been temporarily cured, or she may have done it under the restraint of fear or force of circumstances, for either of which reasons she would be relieved from any implied condonation, by reason of the matters appearing in the pleadings. Moreover, by the present bill it appears that she was fully advised by a reputable physician of the terrible nature of appellant's disease, and that it was incurable, thereby making it plain that then, for the first time, she fully realized his condition and her situation, and that

she then owed it to herself as well as to possible offspring, to refuse longer to cohabit with her husband. Whether she had condoned her husband's offense, was a question of fact which the chancellor properly held, in our opinion, should not have been determined upon the bare allegations of her second bill and the plea, and especially was this the wise course, since it appears from the evidence on the hearing that appellant forced appellee to sleep with him. It is true, he denied that he used any violence toward her, and denied that he insisted upon occupying the same room with her, but the chancellor saw and heard the witnesses, and was therefore far better able to determine which of the two should have been believed on this point. We are unable to say from the evidence that the finding of the chancellor that she had not condoned his offense, was against the weight of the evidence. Appellant does not deny that he was afflicted with the disease as charged in the bill, and that he deserted appellee as charged, is, we think, established by a preponderance of the evidence. It is not claimed that appellee knew of appellant's diseased condition before the marriage, and we are of opinion that when she became fully aware of his condition, when she was advised by a reputable physician, as it appears she was, that the disease was contagious, that it had existed ten years prior to the trial, that she was liable to contract the disease by impregnation—when she found that her child by her husband had constitutional syphilis, when her physician testified he could not tell whether it could be cured or not, she was justified in refusing to cohabit with him, and this fact did not justify him in deserting her. The chancellor was justified by the evidence in finding that appellee had performed toward appellant all her marital obligations, except that of cohabitation, and this she was justified in refusing because of appellant's disease, and the consequent danger to her health of cohabitation with him. His desertion was without just cause, and she therefore lived separate and apart from him without her fault.

In *Johnson v. Johnson*, 125 Ill. 513, in discussing the

statute in regard to separate maintenance, the Supreme Court said: "The fault here meant and contemplated is a voluntary consenting to the separation, or such failure of duty or misconduct on her part as materially contributes to a disruption of the marital relation. * * * But a wife who is not herself in fault is not bound to live and cohabit with her husband, if his conduct is such as to directly endanger her life, peace or health, nor where the husband pursues a persistent, unjustifiable and wrongful course of conduct toward her, which will necessarily and inevitably render her life miserable and living as his wife unendurable."

We have been referred by counsel to no case in which the facts are similar to those of the case at bar, nor have we been able, in the time we could give the case, considering our other duties, to find one strictly in point; but we think it is in accord with reason and good morals, as well as the dictates of humanity and the general expression of the Supreme Court in the Johnson case, *supra*, to hold that appellee was under no obligation to submit to a cohabitation with her husband, when by so doing she constantly endangered her health and possibly her life, as well as that of any child that might be born.

The allowance of alimony made by the chancellor was justified by the evidence. It is true that it is about one-half of what appellee admits was his monthly income, but there was other evidence tending to show that appellant had a larger income and other property besides his income.

The decree is affirmed.

City of Evanston v. Alexander Clark.

1. **ESTOPPEL**.—*To Deny Ownership of Land in Condemnation Proceedings.*—Where a municipal corporation recognizes a person as owner of the premises prior to condemnation proceedings, by negotiating with him for the purchase of the premises for a street, and in the petition for

City of Evanston v. Clark.

condemnation, and also in the verdict of the jury, such person is named as owner, it is an admission by the municipality that he is the owner.

2. *SAME—To Claim a Dedication.*—Where the premises sought to be condemned, was in use by the public as a highway, and the municipality so recognized it, and by its action treated it as a highway by the institution of and prosecution to judgment of the condemnation proceedings, it is estopped to claim a dedication, or title by prescription.

3. *CONDEMNATION PROCEEDINGS—Abandonment.*—While a municipal corporation may, after judgment in condemnation proceedings, abandon the improvement, such abandonment must be in good faith.

4. *SAME—When the Proceedings Can Not be Abandoned.*—A municipal corporation can not, under the pretense of abandonment, repeal the ordinance ordering an improvement, and then take possession of the premises condemned and use it for the purpose contemplated by the repealed ordinance and the condemnation proceedings, and thus defeat the right of the property owner as adjudicated in the condemnation proceedings.

5. *ASSUMPSIT—Lies for Damages in Condemnation Proceedings.*—Assumpsit may be maintained for the negligent failure of a municipality to collect and pay to the owner of condemned property the damages awarded to him.

6. *INTEREST—In Condemnation Proceedings.*—The owner of lands taken by a municipality by condemnation proceedings is entitled to interest from the time the municipality takes possession of the premises at the rate of five per cent on the amount of compensation allowed.

Trespass, quare clausum fregit. Trial in the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Finding and judgment for plaintiff. Appeal by defendant. Heard in this court at the October term, 1897. Affirmed on remittitur, as ordered by the court. Opinion filed June 18, 1898.

GEO. S. BAKER, attorney for appellant.

ALEXANDER CLARK, attorney *pro se*, contended that in order to establish title by prescription, or by dedication by estoppel, it is necessary that the possession should be hostile in its inception, actual, visible, notorious and exclusive, continuous, and made under claim or color of title, and such adverse possession can not be made out by inference or implication, for the presumption of title is in favor of the true owner, and the proof to establish it must be strict, clear, positive and unequivocal. *Zirngibl v. Calumet Dock Co.*, 157 Ill. 447; *Warren v. Town of Jacksonville*, 15 Id. 241;

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Gentleman v. Soule, 32 Id. 272; Kyle v. Town of Logan, 87 Id. 64; Chicago v. Johnson, 98 Id. 618; Herhold v. Chicago, 108 Id. 467; Chicago v. Stinson, 124 Id. 510; Dexter et al. v. Tree et al., 117 Id. 532; City of Ottawa v. Yentzer, 160 Id. 509.

Carrying the condemnation proceedings to judgment estops the city from claiming an easement in the property condemned, and that the condemnation proceedings were not necessary. Town v. Templeton, 71 Ill. 68; Newman et al. v. Chicago, 153 Id. 469; McChesney v. Chicago, 161 Id. 112; I. C. Ry. Co. v. City of Champaign, 163 Id. 524.

Although a city has a right to abandon condemnation proceedings before possession taken, yet the abandonment must be in good faith, and the taking of the property condemned for street purposes must be forsaken. C., R. I. & P. Ry. Co. v. Chicago, 143 Ill. 642; McChesney v. Same, 161 Id. 112; I. C. Ry. Co. v. City of Champaign, 163 Id. 524.

A judgment is a specialty of record and comes under the head of contracts, and like a contract the judgment of condemnation is a unit, and like a contract it can not be rescinded at the election of one party; and if the city of Evanston dismissed the condemnation proceedings and afterward took possession of part of the property condemned and used it for the purposes for which it was condemned, this would make the judgment final as to the whole award, and the owner would have a right to sue for the same. Lovington v. Short, 77 Ill. 588.

A city has no right to lay out its roadway in such a manner as to deprive one side of the street of sidewalk space, and its intention to do so will not be presumed, but must appear by the clearest proof; and such action on its part would be without authority and void. Carter v. Chicago, 57 Ill. 283.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment against appellant and in favor of appellee for the sum of \$4,696.25. The declara-

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tion consists of two counts; the first is trespass *quare clausum fregit*, and the second is in case and sets forth in substance the passage of an ordinance by the village of South Evanston for the widening of Custer avenue in said village, condemnation proceedings for that purpose, the condemnation of certain premises of the appellee, a verdict and judgment awarding compensation therefor, the confirmation of an assessment to pay the cost of the improvement, the annexation of the village of South Evanston to the city of Evanston, the taking possession of the condemned premises by appellant, and neglect of duty on the part of appellant to collect the assessment, or pay to appellee the amount awarded to him as compensation, etc.

Appellant pleaded the general issue and specially that the ordinance ordering the improvement had been repealed, and the condemnation proceedings dismissed; that appellant had been in possession of the premises more than twenty years, and that the action was barred by the statute of limitations.

The village of South Evanston, by its board of trustees, passed an ordinance July 13, 1891, for the widening of Custer avenue, formerly First street, as alleged in the declaration, and November 27, 1891, the village filed a petition in the County Court, describing the property to be condemned for the proposed improvement, and praying that the just compensation to be paid therefor should be ascertained by a jury. The appellee is named in the petition as the owner of the lands herein described and sought to be condemned. Such proceedings were had in the matter of the petition that December 16, 1891, the jury returned a verdict fixing the total compensation to be paid for the premises at the sum of \$4,075; January 5, 1892, the court, on motion of the village, by its attorney, entered judgment on the verdict, the judgment being in the usual form in such cases. January 11, 1892, the village filed in the County Court a supplemental petition setting forth the former proceedings, and praying the court to cause an assessment to be made to pay the compensation awarded, as above stated,

and costs; that the costs should be ascertained and commissioners to make the assessment appointed, etc. The court, on the same day, appointed commissioners to make the assessment. The commissioners made an assessment and filed the assessment roll in court, and February 5, 1892, an order was entered, on motion of the village attorney, that all persons objecting to confirmation of the assessment should file their objections on or before February 10th then next. February 10, 1892, on motion of the village attorney, judgment by default was entered, and the assessment confirmed as to all premises in respect to which no objection had been filed. The only premises in respect to which objections were filed is described as "A strip of land almost 125 feet, including certain laid off lots extending on each side of the C. & N. W. Ry. tracks, and embracing the same, lying between south line of Lincoln avenue and west line of Madison street in section 19, 44, 14."

This piece of property is described in the assessment roll as being a part of the right of way of the C. & N. W. Ry., and is assessed \$1,950. The assessment against that portion of the premises claimed by appellee which was not condemned is \$1,308. The total of all assessments is \$4,486.70.

The village of South Evanston, prior to November 8, 1893, was annexed to and became a part of the city of Evanston and, at the last date, the city of Evanston passed an ordinance purporting to repeal the ordinance of November 16, 1891, ordering the widening of Custer avenue. November 23, 1893, the County Court, on motion of the city attorney, entered an order dismissing the proceedings for widening Custer avenue.

July 24, 1894, the city passed an ordinance for the paving of Custer avenue, which required the paving of a strip of the condemned premises of appellee fifteen feet in width and about 278 feet in length, and in the spring or early summer of 1895 the city paved said strip. The foregoing facts are uncontroverted.

Appellant's counsel claim that appellee has failed to prove title to the premises in question. A link in the chain of

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title proved by appellee was a deed from one James F. Keeney to Joseph B. Leake, the latter being appellee's immediate grantor. Appellant called Leake as a witness, who testified that he did not remember that the deed to him from Keeney was ever delivered to him, but the same witness, while admitting that the deed from himself to appellee was his deed, said he had no recollection of executing it. Leake, by executing a warranty deed to appellee, affirmed, as we think, the execution of the Keeney deed to him. It is not deemed necessary in ejectment, to prove the actual delivery of each deed in the chain of title. If it were, very few, if any, titles would be susceptible of proof. The village of South Evanston recognized appellee as owner of the premises prior to the condemnation proceedings, by negotiating with him for the purchase from him of the premises for a street, and in the petition for condemnation, and also in the verdict of the jury, he is named as owner. This is an admission by appellant that he is owner. *Ry. Co. v. Teters*, 68 Ill. 144.

Appellant claims that the improvement was abandoned by the ordinance of November 8, 1893, purporting to repeal the ordinance ordering it, and by the dismissal of the proceedings by the court November 23, 1893. While a municipal corporation may, after judgment in condemnation proceedings, abandon the improvement, such abandonment must be in good faith. *C., R. I. & Pac. Ry. Co. v. Chicago*, 143 Ill. 643; *McChesney v. Chicago*, 161 Ill. 110; *I. C. Ry. Co. v. City of Champaign*, 163 Ib. 524.

Appellant, July 24, 1894, after the alleged repeal of the ordinance and dismissal of the condemnation proceedings, passed an ordinance ordering the improvement of Custer avenue with a macadam roadway from the north curb line of Washington street to the north line of Oakton avenue, the width of the improvement between the north curb line of Washington street and the north line of Oakton avenue to be thirty feet in width, to wit, fifteen feet on each side of the center line of Custer avenue. The center line of Custer avenue, as the avenue had been used, was the half-

section line, and the half-section line is the west line of appellee's premises, so that the ordinance ordered the macadamizing of a strip of appellee's premises fifteen feet in width and about 278 feet in length, which strip is a part and nearly half of the premises of appellee involved in the condemnation proceedings, and for which he was, in said proceedings, awarded compensation. The trial commenced December 30, 1896, and on the trial John H. Moore, assistant engineer in appellant's department of public works, having been called as a witness by appellant, testified: "The present condition of Custer avenue as to pavement, beginning at Madison street and extending as far north as the north line of Washington street, is that a fifteen-foot strip lying just immediately east of the half-section line is occupied by the city, by a pavement."

The evidence, then, shows conclusively that a large part of the condemned premises of appellee were, by the express order of appellant, taken possession of, paved, and used as a part of Custer avenue, after the alleged abandonment. This was wholly inconsistent with abandonment in good faith. A municipal corporation can not, under the pretense of abandonment, repeal the ordinance ordering an improvement, and then take possession of half or a large portion of the premises condemned, use such portion for the purpose contemplated by the repealed ordinance and the condemnation proceedings, and thus defeat the right of the property owner as adjudicated in the condemnation proceedings. The ordering paved and the paving of the fifteen-foot strip of appellee's premises must be deemed to have been done in view of the judgment in the condemnation proceedings. January 5, 1892, the judgment was rendered by the County Court. November 23, 1893, an order was entered by the court dismissing the proceedings. A number of terms having intervened between the date of the judgment and November 23, 1893, the court, at the last date, was powerless to enter the order dismissing the proceedings, and therefore the order of dismissal was a nullity, and the judgment remained in force. *McChesney v. City of Chicago, supra.*

Appellant's counsel contends, and the evidence tends to show, that long prior to the passage of the ordinance ordering the widening of Custer avenue, part of the premises in question was in use by the public as a highway, and that appellant had so recognized it, and, by its action, treated it as a part of the highway. But appellant, by the institution of and prosecution to judgment of the condemnation proceedings, is estopped to claim a dedication, or title by prescription. *Town of Princeton v. Templeton et al.*, 71 Ill. 68.

Even if this were not so, we are of the opinion that the evidence is insufficient to establish a dedication of the premises as a highway.

In *Wheeler v. City of Chicago*, 24 Ill. 105, it is held that assumpsit may be maintained for the negligent failure of a municipality to collect and pay to the owner of condemned property the damages awarded to him. In *Clayburgh v. City of Chicago*, 25 Ill. 535, it is held that, in such case, case will lie. See, also, *Corwith v. Village of Hyde Park*, 14 Ill. App. 635, and *City of Chicago v. Hayward*, 60 Ill. App. 582.

In *Village of Hyde Park v. Corwith*, *supra*, Justice McAllister, delivering the opinion of the court, after conceding the right to abandon within a reasonable time, says: "While, on the other hand, if such party shall, without payment or tender of the compensation awarded, and without the consent of the owner, appropriate the property by taking possession, then such owner may have his action of ejectment to recover the possession, or trespass for the damages, which might be the value of the property (*Smith v. Railroad Co.*, 67 Ill. 191), or he might bring case, or, perhaps, waive the tort and maintain debt for the amount awarded."

Finally, it is objected that the judgment is excessive. Appellee introduced no evidence as to damages, but relied solely on the award, and the wrong or negligence of which he complains is the failure of appellant to collect the assessment and pay the award. Had appellant collected the

assessment, appellee would only have been entitled to receive the difference between the amount of the compensation awarded in respect of the part of his property proposed to be taken, and the amount assessed against the remainder for special benefits. The amount of the award is \$4,075, the amount assessed as benefits \$1,308, and the difference between these two is \$2,767, which is the amount appellee would have been entitled to receive had appellant collected and paid the award within a reasonable time. We think it clear that appellee is not, excluding the question of interest, entitled to receive any more than he would have been entitled to receive had appellant performed the duty the non-performance of which appellee complains of. Moore, appellant's witness, testified that the paving was done in the early part of 1895, in the spring or early summer.

We are of opinion that the appellee is entitled to interest from the time when the city took actual possession by the construction of the pavement (*City of Chicago v. Palmer*, 93 Ill. 125), which time the evidence warrants us in fixing at June 19, 1895. The judgment appealed from was entered June 19, 1897, and should have been for \$2,767, with interest from the time the city took possession and paved the property. The interest for two years at five per cent per annum is \$276.70, making the total of principal and interest \$3,043.70, which is \$1,652.55 less than the judgment appealed from.

Upon a remittitur of \$1,652.55 being entered by appellee within ten days from this date, the judgment will be affirmed, otherwise it will be reversed and remanded, the appellant, in either case, to recover its costs in this court.

Albert L. Deane et al. v. Denver & Rio Grande R. R. Co.

1. *PRACTICE—Taking Exception.*—If counsel desire to avail of any error in the language of the court when ruling upon admissibility of evidence, a specific exception to the language used should be preserved.

Deane v. D. & R. G. R. R. Co.

Assumpsit, for merchandise sold and delivered. Trial in the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the October term, 1897. Affirmed. Opinion filed June 18, 1898.

STATEMENT.

Appellee recovered judgment in a suit for breach of warranty as to certain safes, sold by appellants to appellee. There were conversations between representatives of the two parties, and the specifications for the safes ordered were finally reduced to writing, and form the basis of the contract as to construction and quality. A part of the specifications of the car safes were worded as follows:

"The walls of said safe to be three inches thick and the interior to be lined with one-half inch five-ply drill-proof steel, secured at all corners by solid five-ply steel angles one-half inch in thickness, making combined thickness at joints of one inch. Said angles secured to lining by double conical seven-ply steel rivets, which are so arranged that they can not be drawn out or driven in, and make the walls as secure as a solid mass. The door of safes to be composed of three plates of metal, as follows: The two outer plates to be of five-ply drill-proof steel and iron three-eighths inches thick, the inside plates to be of soft steel three-eighths inches, making a combined thickness of $1\frac{1}{4}$ inches.

"All plates to be held together by Hall's patent conical steel plugs and frame bolts."

It was also specified that construction and security of these safes should be the same as in former car safes sold to appellee by the Hall Safe & Lock Co.

The specifications of the station safes were in part as follows:

"Outer door to be lined with three alternate plates of iron and five-ply drill-proof steel, making a combined thickness of one inch.

"Also to be secured by heavy wrought iron bolts working in wrought iron frames and secured to door by Hall's patent conical frame bolts."

It is undisputed that the safes delivered and paid for by appellees were not constructed in compliance with these specifications, in that straight bolts were used in fastening the plates instead of the conical bolts specified; nor were they like in construction to former safes purchased by appellee from Hall Safe & Lock Co. As to whether this deviation from the construction specified made the safes of less value or less secure, there was a conflict in the evidence. Witnesses for appellants testified that the straight bolt was an improvement upon the conical bolt called for in the specifications. Witnesses for appellee testified that the conical bolts would give much greater security. One witness, an expert, Gregg, testified: "The old or former safes have steel screws; the ones in question have iron screws. I think I could open one in ten minutes. If safe was made according to specifications, I think it would take an hour or hour and a half to open it. Hall's conical bolts were not used in these safes. The method of construction was not apparent on examination. It was necessary to strip the door to detect the defects." Another expert, Ainsworth, testified: "It was not as great a protection against burglars as if built according to the specifications, on account of the rivets, bolts or screws." The evidence tended to show that the appellee bought the safes for the purpose of using them in its cars and stations, where protection against burglars was desired, and that appellants knew this purpose and intended use. Buzzell, a dealer in safes, testified that the value of the car safes was about \$80 each. There were six car safes at \$155 each, and twenty-five car safes at \$150 each, delivered under the contract and paid for by appellee. Hobbs, agent of appellee, testified that the value of the station safes was about \$75 each. Twenty station safes at \$160 each were paid for by appellee.

Appellee recovered verdict and judgment thereon for \$1,395.

MILTON I. BECK, attorney for appellants.

GEORGE W. BROWN, attorney for appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

It is undisputed that the goods delivered to and paid for by appellee did not comply with the agreed specifications. There was evidence which warranted the jury in finding that the safes delivered afforded less security and were of less value than the safes specified, and that the difference amounted to as much as \$1,395. The verdict not being against the weight of the evidence, it only remains to consider questions of procedure at the trial. Counsel urge that the judge presiding at the trial made improper comment upon one of the witnesses. The abstract shows the following as having taken place:

Q. "How long would it take you to open a safe made as that safe is made?"

Mr. Beck: "Objected to."

The Court: "If this man doesn't know, it would be hard to get a man who does know."

Mr. Beck: "I will take an exception."

The comment of the court is subject to criticism, for it might lead the jury to give an undue weight to the testimony of the witness, who was an expert called by appellee. But we can not determine from the record that the exception was taken to the language of the judge rather than to the ruling of the court upon the admissibility of the testimony. Counsel argue now as if the exception was to the former, but the conclusion to be drawn from the record is that it was an exception to the ruling upon the objection to the testimony proffered. The trial court would not naturally regard the exception thus generally taken as applying to anything other than the ruling upon the evidence. Nor does it appear whether the attention of the court was directed to the matter upon motion for a new trial. We are of opinion that if counsel desire to avail of any error in language of the court when ruling upon admissibility of evidence, a specific exception to the language used should be preserved. The testimony in question was that of an expert and related to the security of one of the safes in controversy. We think it was competent to show how readily

the safe could be forced open, especially when this evidence was followed by other testimony to show what in comparison would be the resistance to like efforts if the safe had been constructed according to the contract.

It is urged that the court erred in permitting an answer to the following question :

"What was the general workmanship—the finish of those safes?" The objection is that the finish of the safes was not in question. The answer of the witness, however, disposes of the objection; for the answer is limited to construction, and that was in controversy.

It is also urged that there was error in the ruling of the trial court as to admissibility of evidence of the cost to the manufacturer, of making the safes as delivered compared to the cost of making such safes as were contracted for. Ainsworth testified that there was a substantial difference between the cost of safes delivered and such safes as were specified. To this there was objection, but no exception.

Gregg was examined upon this subject as follows :

Q. "What would be the difference in cost to manufacture these safes delivered to us, from the cost of the safes demanded by these specifications, if you know?"

Objected to, and objection sustained.

Q. "Would there be a material saving in making these safes as they are made, and making them according to specifications?"

Objected to.

The Court: "So far as your knowledge extends, you may answer that question."

To the ruling of the court defendants excepted.

A. "I think there would be a saving of from forty to fifty per cent."

Objected to.

Q. "That you haven't been asked. I simply asked you whether there would be a saving?"

A. "There would be a very material saving."

To the last question no objection was made. But if the prior objection and exception be treated as sufficient and

not waived by permitting the later question to be answered without objection, yet we are not inclined to view the admission of this evidence as so prejudicial to appellants as to constitute reversible error. It is true that the inquiry was not material. The issue was as to whether the safes delivered answered to the specifications, and, if not, the difference in value. The cost to the manufacturer could afford no criterion by which to determine these questions. While in some instances cost may be properly inquired into upon cross-examination of a witness who has testified to a value, it could not here be an item of affirmative proof to establish value or compliance with specifications. But upon consideration of the whole evidence, we are of opinion that the admission of this testimony, if objection to the same was not waived by counsel, is not such error as ought to cause a reversal of the judgment. The one answer to which the exception can be considered to apply, merely states that "there would be a very material saving" in the construction of such safes as were delivered. It was conceded that the specifications were not fulfilled. Competent evidence was presented, which showed the details of variation and the differences in value. We think appellants were not prejudiced by the admission of the testimony.

The court ruled correctly in excluding an answer to the question put to the witness, Cory, in this same connection, viz., the comparative cost of constructing straight and conical bolts.

Finally, it is contended that the verdict is excessive.

There were thirty-one of the car safes, for six of which appellee paid \$155 each, and twenty-five for which it paid \$150 each. The testimony of Buzzell, who was a dealer, showed them to be of the value of \$80 each. The difference upon the car safes alone was an amount larger than the damages awarded. There were twenty station safes for which appellee paid \$160 each. The testimony of Hobbs showed them to be of the value of about \$75 each. The difference upon the station safes alone was greater than the award of the jury. The jury may have properly credited

this testimony. We can not say that the verdict is against the weight of the evidence either as to the right to recover or the amount awarded.

The judgment is affirmed.

Jacob Rosenberg et al. v. Hyman B. Stern et al.

1. *APPELLATE COURT PRACTICE—What an Appeal Brings Before the Court.*—An appeal from an order denying an application to file an intervening petition does not bring before the court for review, errors in the final decree or in the proceedings anterior thereto.

2. *SAME—Province of the Reviewing Court.*—The province of a reviewing court is limited to the consideration of assigned errors of law or fact in the trials of causes.

3. *SAME—Disrespectful Language in Briefs and Arguments.*—Language in the briefs and arguments of counsel which is indecorous and disrespectful to the trial court, will be stricken out on motion.

Appeal, from an order denying an application to file an intervening petition, entered by the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the March term, 1898. Affirmed. Opinion filed June 29, 1898.

MORAN, KRAUS & MAYER and HOFHEIMER & PFLEUM, attorneys for appellants.

Ordinarily the expenses of the receivership are charged against the fund which comes to the receiver's hands. But if the funds are insufficient to meet the expenses, they may be taxed as costs. If the receiver is improperly appointed the expenses may be taxed against the party who procured the appointment. If the receiver is properly appointed, and the funds are insufficient to meet the expenses they will be taxed as costs against the losing party. *French v. Gifford*, 31 Iowa, 428; *City of St. Louis v. St. Louis G. L. Co.*, 11 Mo. App. 237; *City of St. Louis v. St. Louis G. L. Co.*, 11 Mo. App. 243; *City of St. Louis v. St. Louis G. L. Co.*, 87 Mo. 223; *Brindage v. Home Sav. & Loan Ass'n*, 39 Pac. Rep. 669; *Einstein v. Lewis*, 54 Ill. App. 520; *Myres v. Frankenthal*, 55 Ill. App. 390.

The rule is that while the fund in the hands of the

receiver is primarily liable for the receivership expenses, yet if that fund fail or has been distributed, or if the receiver is improperly appointed, the expenses incurred by the receiver are properly taxed against the party procuring the appointment of the receiver. *Knickerbocker v. McKindley Coal and Mining Co.*, 67 Ill. App. 291; *Highley v. Deane*, 168 Ill. 266.

Courts of chancery are without jurisdiction to decree dissolution of corporations. *People v. Weigley*, 155 Ill. 491, 503-506. *Coquard v. National Linseed Co.*, 171 Ill. 480, 485; *Hunt v. LeGrand Roller Skating Co.*, 143 Ill. 118; *Wheeler v. Pullman Iron & Steel Co.*, 143 Ill. 197.

FRANCIS W. WALKER, attorney for certain appellees; NEWMAN, NORTHRUP & LEVINSON, of counsel.

Inasmuch as this appeal does not purport to have been taken from the decree itself but only from an order denying a motion (attempted to be) made after a final decree had been rendered, the decree itself is not before the court for consideration, nor are any of the proceedings prior to this motion reviewable here. *Nelson v. Benson*, 69 Ill. 27; *Schwartz v. Southerland*, 51 Ill. App. 178; *Radge v. Berner*, 30 Ill. App. 183.

The motion from which this appeal purports to have been taken was made in a cause wherein a final decree had been rendered at a prior term. The court, therefore, had no jurisdiction to entertain the motion, and certainly no jurisdiction to grant it.

The rule in this particular is the same in equity as at law. *Jacquemart v. Erb*, 53 Ill. 291; *Lilly v. Shaw*, 59 Ill. 77; *Hurd v. Goodrich*, 59 Ill. 450; *Davenport v. Kirkland*, 156 Ill. 175.

"That the motion can not be entertained at all at a subsequent term after final judgment is settled by the case of *Cook v. Wood*, 24 Ill. 295." *Cox v. Brackett*, 41 Ill. 225.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

This is an appeal by Jacob Rosenberg, Charles L. Wil-

loughby and Isaac H. Mayer from an order entered in the suit of Hyman B. Stern et al. v. Willoughby, Hill & Co., a corporation, et al., in chancery, refusing permission to appellants to file an intervening petition in said suit. The bill in the cause of Herman B. Stern et al. v. Willoughby, Hill & Co., et al., filed March 2, 1897, was in the nature of a creditor's bill, and was filed under and in pursuance of section 25 of the general act concerning corporations. Issues were made up and a final decree was rendered in the cause April 17, 1897, at the March term of the court. In the record, as it was April 17, 1897, the following order appeared :

"The motion of Max Hart, composing the firm of Hart, Schaffner & Marks, to set aside the decree entered herein at this date, was ordered by the court entered and continued to the next term of this court." May 15, 1897, at the April term of the court, Simon Kirschbaum and others moved to set aside the decree entered April 17, 1897, which motion was continued to the May term of the court. May 17, 1897, being the first day of the May term of the court, appellants moved the court for leave to file an intervening petition, and an order was entered that the motion to set aside the decree of April 17, 1897, should not be disposed of or withdrawn, without at least one day's notice to Moran, Kraus & Mayer, solicitors for appellants. May 24, 1897, an order was entered reciting that the motion of Max Hart was argued, etc., and overruled, and at the same date an order was entered overruling the application of appellants for leave to file an intervening petition, to which last order appellants excepted.

The appeal being solely from the order denying the application of appellants to file an intervening petition, does not bring before us for review errors, if any, in the final decree, or in the proceedings anterior thereto, notwithstanding which a large part of the arguments of appellants' counsel is devoted to the discussion of alleged errors in such proceedings and in the decree. The following appears in the certificate of evidence in the record: "The court further

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certifies that no order was ever directed to be entered by this court in the above entitled cause of Hyman B. Stern et al. v. Willoughby, Hill & Co. et al., or any other cause, granting leave to Max Hart, or to the firm of Hart, Schaffner & Marks, or to all, any or either of the members of said firm of Hart, Schaffner & Marks, to set aside the final decree entered in said cause of Herman B. Stern et al. v. Willoughby, Hill & Co. et al., and that the following words now appearing upon the records of this court, in said cause of Hyman B. Stern et al. v. Willoughby, Hill & Co. et al., under date of the 17th day of April, A. D. 1897, to wit, 'The motion of Max Hart, composing the firm of Hart, Schaffner & Marks, is ordered by the court entered and continued till the next term of this court,' were never ordered to be entered by this court, and appear upon the records of this court without the direction or authority of this court, and ought to be expunged, and are this day expunged from said records, viz., on September 24, 1897. To the entry of which order expunging said words and modifying said record, said petitioners hereby except and object, and then and there excepted and objected."

September 28, 1897, the court, on notice to appellants and others interested, entered an order amending the record by expunging therefrom the order of April 17, 1897, reciting the motion of Max Hart to set aside the decree and continuing the motion to the next term.

Appellants' counsel vigorously assail the proceedings in relation to the expunging from the record the order of April 17th, although that order is not appealed from. Waiving, for the present, consideration of those proceedings, we will consider appellants' rights in the premises, on the hypothesis that the order of April 17th, relating to Hart's motion, was properly entered and remains in force. Max Hart was not a party to the cause of Stern et al. v. Willoughby, Hill & Co. et al. He filed neither petition nor affidavit, nor any document whatever showing that he had any interest in the cause or in any matter involved in it. He came before the court a mere stranger to the cause, and merely moved, as

the record recites, to set aside the final decree. He had no standing in court, and the court, on the hypothesis that he made such motion, should have refused to entertain or consider it. But, if the court did, as the record before amendment recited, continue the motion to a subsequent term, the motion, when reached for hearing, was properly overruled. The motion of appellants for leave to file an intervening petition was made at the May term, 1893, a full term having intervened between the date of the final decree and May 17, 1893, the date of appellants' motion. Appellants' counsel contend that the continuance of the Hart motion till the April term gave the court "the same power over the cause at the April term that it had at the March term," etc., and that the Hart motion being still pending May 17, 1893, their application was in apt time; and cite *Windett v. Hamilton*, 52 Ill. 180, and *Hibbard v. Mueller*, 86 Ill. 256, in which cases it is merely decided that when a motion is made to set aside a default and vacate a judgment at the term at which the judgment is rendered, and is continued till the next term, the court has power at such next term to vacate the judgment. Giving to the continuance of Hart's motion the utmost effect which it could have if made by one entitled to make it, it merely operated to preserve the jurisdiction of the court to consider and act on that motion at a subsequent term. On the hypothesis that the petition which appellants asked leave to file was a meritorious one, and such, in all respects, as the court should permit to be filed, if application for leave to file it were made in apt time, then the application having been made after the term at which the final decree was rendered, the possible future right of appellants to file the petition depended solely on the action of the court on the Hart motion, and when the court very properly overruled that motion, appellants' application was also properly and necessarily overruled.

In view of what has been said, we deem it unnecessary to consider the expunging order of September 28, 1893. A motion made by appellees' counsel to strike from the files the briefs of counsel for appellants, on the ground that they

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contain language indecorous and disrespectful to the court, was reserved till the hearing. In support of their motion excerpts from pages 1, 2, 6, 18 and 25 of the opening argument of appellants' counsel, containing the language complained of, have been filed. The language of these excerpts can not be otherwise considered than as indecorous and disrespectful to the trial court. Remarks which, perhaps, might find some slight palliation when uttered in the heat or excitement of oral debate, may be inexcusable when coolly committed to writing. If counsel would only bear in mind that the province of a reviewing court is limited to the consideration of assigned errors of law or fact in the trials of causes, and that remarks not pertinent to such errors are wholly irrelevant and can not benefit the causes which they advocate, and that the judges of reviewing courts are not censors *morum* of their brother judges presiding in the trial courts, such language as that complained of would occur more rarely, if ever.

The language in the excerpts above mentioned, and contained on pages 1, 2, 6, 18 and 25 of the briefs of counsel for appellants will be stricken from said briefs, and the order appealed from will be affirmed.

William E. Brown v. Sylvester J. Fitzpatrick.

1. **APPEALS**—*The Bond Determines the Court to Which it Lies.*—Where an appeal is perfected the court to which the appeal lies is determined by the bond and not by the recitals of the transcript.

Assumpsit.—Trial in the County Court of Cook County; the Hon. WALES W. WOOD, Judge, presiding. Finding and judgment for plaintiff. Appeal by defendant. Heard in this court at the March term, 1898. Affirmed. Opinion filed June 29, 1898.

W. E. BROWN, attorney for appellant.

JOSEPH WRIGHT, attorney for appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

Appellee recovered a judgment before a justice of the peace. Appellant filed an appeal bond, in which bond the appeal is recited as taken to the County Court. A transcript of the judgment of the justice of the peace was filed in the County Court, in which transcript it is recited that defendant (appellant) "prays an appeal to the Circuit Court of Cook County."

The cause was heard in the County Court and resulted in a judgment for appellee.

It is contended by counsel for appellant that because the transcript of the judgment of the justice of the peace recited that an appeal had been prayed to the Circuit Court, therefore the cause was pending in the Circuit Court, and not in the County Court, and that the County Court was without jurisdiction. It is sufficient answer to this contention that the appeal is perfected and the court to which the appeal lies is determined by the bond and not by the recitals of the transcript. *Fix v. Quinn*, 75 Ill. 232.

The recital in the transcript naming the court to which appellant has prayed an appeal was unnecessary, and no such recital could affect the operation in law of the giving of the bond, by which the appeal was taken and directed to the County Court.

No reason is presented why the cause should have been stricken from the short cause calendar.

The judgment is affirmed.

B. M. Shaffner v. John F. Waters.

1. **APPEALS FROM JUSTICES—*Payment of Costs.***—On taking an appeal from a justice of the peace by filing an appeal bond with the justice, the statute (Hurd, 1898, p. 884) requires the party praying the appeal to pay ten dollars to the justice for the use of the clerk of the court to which the appeal is taken, and peremptorily prohibits the justice from approving the appeal bond on a failure to pay that amount.

Certiorari Proceedings.—Appeal from the Circuit Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Hearing and

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order entered quashing the writ. Heard in this court at the March term, 1898. Affirmed. Opinion filed June 29, 1898.

B. M. SHAFFNER, *pro se*.

JOHN F. WATERS, *pro se*.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from an order of the Superior Court of Cook County quashing a writ of certiorari issued on the petition of appellant. The petition, filed May 7, 1897, recites that John F. Waters, on March 25, 1897, began suit before Justice Everett to recover \$200 claimed to be due him from petitioner for legal services rendered plaintiff in the suit of McLean v. The Washington Ice Company, heretofore pending in said court; that petitioner never employed said Waters to try said case, and that petitioner is in no wise indebted to him; that on March 30, 1897, said justice rendered judgment for \$200 against petitioner in his absence; that the reason of such absence was because said Waters theretofore agreed to continue said cause until some future time so that if possible matters therein involved might be amicably settled; that, relying upon such promise, petitioner did not appear before said justice.

That on April 19, 1897, being within the twenty days allowed by statute to appeal said cause, the petitioner filed his appeal bond with said justice in the sum of \$400 with good and sufficient sureties, and that said justice then and there stated to petitioner that the surety was sufficient and that he would approve said bond; that in the course of dealing between said justice and petitioner, charges and costs of the justice were charged to petitioner by such justice, from time to time, and that thereafter said justice would collect same from petitioner, and that petitioner believed that the costs of such appeal would be charged to and collected from petitioner as usual; that said Waters, before and after the rendition of the judgment, claimed only \$100 due him from petitioner.

That, although such appeal was taken and perfected, such justice, on May 6, 1897, issued an execution to Constable Peter F. Breton, and a levy was made on the goods and chattels of petitioner; that said justice now claims that although he said the bond was good and that he would approve the same, yet because the costs of appeal were not paid, he was compelled to issue said execution; that said justice had no right to issue such execution.

That petitioner requested said justice to recall such execution and to send up the papers of such appeal to the Circuit Court, and petitioner then and there tendered the sum of \$12.50 to said justice, being the fees of the clerk of the Circuit Court, but that said justice refused to accept same, etc.

It sufficiently appears from the petition that appellant knew of the judgment April 19, 1897, in time to appeal, and he may have known of it the very day the judgment was rendered, for aught appearing in the petition, because it is not averred in the petition that appellant did not know of the judgment before April 19, 1897, and the petition is to be taken most strongly as against appellant. His only excuse for not pursuing his remedy by appeal, is that he supposed from his previous dealings with the justice that the latter would advance for him the costs of the appeal. In this he seems to have been the victim of misplaced confidence. On taking an appeal from a justice of the peace by filing an appeal bond with the justice, the statute requires the party praying the appeal to pay ten dollars to the justice for the use of the clerk of the court to which the appeal is taken, and peremptorily prohibits the justice from approving the appeal bond on failure to pay that amount. 2 S. & C. Stat., Ch. 53, Sec. 83.

Appellant's excuse for his failure to perfect his appeal is insufficient; the writ of certiorari was properly quashed, and the judgment will be affirmed.

North Chicago Street Railroad Co. v. Anna Belle Barber.

1. *DAMAGES—Evidence of Special Engagements.*—While it is competent under general allegations in actions for personal injuries to show the occupation and business of the plaintiff and her ordinary wages or earnings, it is not competent to show a special engagement and loss consequent.

2. *PLEADING—Special Damages.*—The ends of good pleading, which are to apprise the opposite party of the nature of the claim and prevent surprise, make it necessary that special damages, and the facts on which they are based, should be set out in the declaration.

3. *SAME—Averments of Particular Damages.*—In order to recover compensation in actions for personal injuries for inability to work at the plaintiff's ordinary employment, all that is necessary in the declaration is the general averment of such inability, caused by the injury, and consequent loss and damage; and proof of his particular employment or business, and of his ordinary wages or earnings therein, is admissible in evidence under such general averment; but where it is sought to recover for loss of property or earnings that depend upon the performance of a special contract or engagement, then such special and particular damages, and the facts on which they are based, must be set out in the declaration.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Verdict and judgment for plaintiff. Heard in this court at the October term, 1897. Remittitur ordered and judgment affirmed. Opinion filed June 29, 1898.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

There can be no recovery of special damage in this case without an allegation in the declaration to that effect. *City of Chicago v. O'Brennan*, 65 Ill. 160; *Tomlinson v. Derby*, 43 Conn. 562; *Taylor v. Monroe*, Id. 43.

HENRY M. BACON and HENRY SCHOFIELD, attorneys for appellee; WILLIAM SCHOFIELD, of counsel.

MR. JUSTICE SEARS delivered the opinion of the court.

Appellee brought this suit to recover for personal injuries received while a passenger of the appellant and through its

negligence. No question is raised as to the right to recover, nor is there any question as to the propriety of the procedure in the trial court, except in one particular, viz.: the admission of evidence showing special damages by reason of loss in a special engagement. Appellee was engaged as the representative of a foreign firm of harp manufacturers to represent the business of the firm at the World's Fair at Chicago. Her engagement was to give harp recitals and to sell the instruments. She was permitted to testify that she was to receive during the engagement fifty dollars per week, and that during August, September and October, after the injury in question, she was unable to properly perform her task, and was obliged to pay out one-half of her salary to others who assisted her. This testimony was objected to by appellant and, when admitted over objection, exceptions were preserved. Under the pleadings here the testimony was not admissible. The declaration contains no allegation of this special engagement or of any special damages in this behalf.

While it was competent, under the general allegations, to show the occupation and business of the appellee and her ordinary wages or earnings, it was not competent to show a special engagement and loss consequent. *City v. O'Brennan*, 65 Ill. 160; *City v. Chamberlain*, 104 Ill. 268; *T. W. Ry. Co. v. Friedman*, 146 Ill. 583; *C. & E. R. R. v. Meech*, 163 Ill. 305.

In *City v. O'Brennan*, *supra*, Mr. Justice McAllister, in delivering the opinion of the court, said: "In order to subserve the ends of good pleading, which are to apprise the opposite party of the nature of the claim and prevent surprise, it was necessary that these special damages and the facts on which they were based, should have been set out in the declaration."

In *C. & E. R. R. v. Meech*, *supra*, the court said: "The rule deducible from the cases in this State is, that in order to recover compensation for inability to work at the plaintiff's ordinary and usual employment or business, all that is necessary in the declaration is the general averment of such inability, caused by the injury, and consequent loss and

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damage, and that proof of his particular employment or business, and of his ordinary wages or earnings therein, is admissible in evidence under such general averment, but that where it is sought to recover for loss of property or earnings that depend upon the performance of a special contract or engagement, then those special and particular damages, and the facts on which they are based, must be set out in the declaration. The distinction we have noted may be a relaxation of the common law rule, but it is founded upon the precedents to be found in our reports."

It is, however, exactly determinable what extent of prejudice may have resulted to appellant by the admission of this testimony. The engagement covered just three months in which any loss is shown. The amount of the loss is shown to have been just one-half of the salary for these three months. This would amount to precisely \$300. Appellant does not contend that it was prejudiced to any greater extent. Nor is it claimed that the verdict is excessive, except in relation to these special damages and to the extent thereof. It is, therefore, proper that opportunity be given to appellee to voluntarily cure the error by a remittitur and thereby avoid another trial. To the extent of the remainder of the judgment, after a remittitur of \$300, we think the award is fully sustained by the evidence.

If appellee shall remit the amount of \$300, within ten days hereafter, the judgment will be affirmed as to the remainder; otherwise it will be reversed and the cause remanded. In either event appellant will recover costs.

Mutual Reserve Fund Life Association v. William B. Smith.

1. **DECREE**—*Must be Based upon a Bill or Petition.*—Every decree in chancery in favor of a complainant must be based on a bill or petition as its foundation. Proofs without allegations are as insufficient to support a decree as allegations without proofs.

2. *SAME—Allegations and Proofs Must Correspond.*—The rule being that to warrant a decree for the complainant the allegations and proofs must correspond, sufficiently illustrates the necessity of a bill or petition containing proper allegations.

3. *PLEADINGS—Affidavits Filed in a Chancery Suit Are Not.*—Affidavits filed in a chancery suit in support of a motion can not be considered as a pleading upon which to base a decree.

Bill for Relief.—Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1898. Reversed. Opinion filed July 21, 1898.

CRATTY BROS., JARVIS & CLEVELAND, attorneys for appellant.

ABRAM B. STRATTON, attorney for appellee; ALFRED R. UNION, of counsel.

MR. JUSTICE ADAMS delivered the opinion of the court.

This appeal was heretofore dismissed by this court on the ground that the order appealed from was not final, but on appeal to the Supreme Court the judgment of this court was reversed and the cause remanded, the Supreme Court holding that the order appealed from was a final, and, therefore, an appealable order.

The nature of the case in which the order appealed from was entered, and the proceedings preliminary to the entry of the order, are concisely stated by the Supreme Court in 169 Ill. 266-268, as follows:

"The appellee and a number of others, as complainants, had pending in the Circuit Court a proceeding in chancery, the prayer of which was that the appellant association should be restrained by the decree of the court from collecting, by way of assessments upon its policy holders, sums of money to be devoted to the creation of an alleged unlawful permanent reserve fund, and that the assessments of the complainants might be paid out of the reserve fund now, as the bill alleged, illegally in the possession of the association, or that such alleged, illegal reserve fund should be distributed among the policy holders of such association, and that,

pending a hearing of the case, a temporary injunction might be awarded the complainants, restraining the association from declaring the policies lapsed, in order that the same may stay in full force and effect until the court could determine the case. The motion for a preliminary injunction was heard and denied, and the complainants and the association, on December 30, 1895, in view of the fact of failure to pay the assessments during the pendency of the suit might result in forfeiture of the policies, entered into a stipulation providing for the payment of the assessments to one of the solicitors for the association, to be by him held and disposed of according to the final decree of the court. On the 13th day of March, 1896, some two and a half months after the stipulation had been entered into, during all of which time appellee had made no payments thereunder, but was in default under the agreement, he made application to the court to have the stipulation permitting the payment of accrued and accruing assessments to the solicitor extended, so as to permit him to pay his assessments at that time and have the benefit of the provisions of the stipulation. The court required the appellant to answer this application, and afterward heard the testimony of the respective parties, and entered a decree, declaring that the policy of appellee should not be regarded as forfeited for non-payment according to the terms of the stipulation, and that the association should reinstate him to all the rights and privileges accorded him by the stipulation, upon payment by him of all assessments due up to that date, with legal interest thereon.

The court had refused to restrain the collection of the assessments during the pendency of the suit, and the parties to the litigation, in view of such refusal of the court, entered into the stipulation providing for the payment of such assessments to a designated third party, to be by him held until the case should be determined, and then to be paid by him to the party entitled to receive the same under the decree. The appellee did not comply with his undertaking in the stipulation, and insisted that reasons existed why the court

should relieve him from the consequences of his default. The stipulation and its provisions, and the duties and obligations of the parties, were distinct from the general subject of the litigation. Only the appellee and the appellant association were parties to the controversy. The numerous other parties to the litigation were in no wise interested in or affected by its determination."

The bill in the principal case was filed October 10, 1895, by George T. Elliott and others, not including appellee, who were members of the appellant association. October 31, 1895, an assessment against the complainants fell due. By the terms of the certificates of membership and by-laws of the association, membership might become forfeited by failure to pay an assessment when due. Therefore, October 31, 1895, the parties, by their solicitors, stipulated that a motion made in the cause by the complainants for a temporary injunction might be placed on the contested motion calendar, to be heard, if possible, Monday, November 11, 1895, and that, in the meantime, the policies of the complainants and their rights thereunder should remain *in statu quo*.

November 6, 1895, it was stipulated by the solicitors for the respective parties that the bill might be amended by making appellee, William B. Smith, and another person parties complainant, and the bill was amended accordingly. December 18, 1895, the motion for a temporary injunction was heard and denied, but the final order denying the injunction was not entered until December 30, 1895. At the last date, several assessments having fallen due since the commencement of the suit, and remaining unpaid, the parties, including appellee, stipulated by their solicitors, among other things, as follows :

"Whereas, in the above entitled action, a motion has heretofore been made herein for the relief recited in the complaint herein.

And whereas, said motion came on to be argued on the sixteenth day of December, A. D. 1895, before Hon. O. H. Horton, judge of said court, and said motion on such hearing was denied.

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And whereas, heretofore, the parties to this action have amicably agreed and stipulated that the defendant would take no action for the non-payment of premiums becoming due until the hearing of said motion.

It is hereby stipulated that all sums now due and payable to the defendant as assessed by it for dues and mortuary premiums which have heretofore been due and payable and remain unpaid, or which may hereafter, until the final determination of this action, become due and payable under and by virtue of the terms and conditions of the respective certificates of membership or policies of insurance herein of the above named plaintiffs herein respectively, may be paid to Thomas Cratty at his office in Security building, Chicago, Ill., with the same effect as if the same were or should be paid to the defendant, subject, however, to all the conditions, stipulations and agreements of said respective certificates of membership or policies of insurance as to forfeiture for non-payment, and all other conditions and terms, except that said payments may be made to said Thomas Cratty in lieu of the defendant, provided, however, that unless the said respective sums and all of them which have heretofore become due and payable under the terms and conditions of said respective certificates of membership or policies of insurance, or any of them, shall not be paid to said Thomas Cratty within ten days after the date of this agreement, or if any sum due and payable hereafter under the terms of said several certificates of membership or policies of insurance or any of them respectively, shall not be paid as provided in said certificates of membership or policies of insurance, then, and in that event, said certificates of membership or policies of insurance, as to such of them in which said default for non-payment shall exist, shall respectively be deemed terminated, lapsed, and null and void, and all sums theretofore paid thereon shall be deemed forfeited to the defendant in the same manner and to the same extent as if said payments or any of them had been made or omitted to be made to the said defendant under the terms and conditions of said certificates of membership or policies

of insurance, or any of them respectively, if this agreement had not been made," etc.

William E. Mason, solicitor for appellee, signed the stipulation on behalf of the complainants. The stipulation was made out of court and was not filed in the cause, but was made a part of appellant's answer to the motion hereafter mentioned. March 13, 1896, appellee, by A. B. Stratton, who became his solicitor in January, 1896, at which time Mason withdrew from the case, served a notice on complainant's solicitor, William E. Mason, and the solicitor for the defendant, that on Monday, March 16, 1896, he would, before his honor, Judge Gibbons, ask to have the stipulation permitting the payment of accrued and accruing assessments to Thomas Cratty extended, so as to permit William B. Smith to pay his assessments at the present term, and would read on the hearing of said motion the affidavits of William B. Smith and Augusta Smith, annexed to the notice. The notice and affidavits mentioned therein were filed March 16, 1896. No written motion was filed nor any pleading in support of the application, but only the notice and affidavits. The affidavits are as follows:

"William B. Smith, being first duly sworn, deposes and says, that at the time of the filing of the bill of complaint in this cause, he was a policy holder in the above named Mutual Reserve Fund Life Association of New York, and had been a policy holder therein continuously for about ten years prior thereto; that he had at all times met promptly the payment of assessments made upon him on account of said policy, and desired to continue to do so. Affiant further says that a few days after the filing of said bill of complaint, but before the time had expired for the payment of the October assessment (he being then in feeble health), affiant sent his wife, Augusta Smith, to the office of Mr. William E. Mason, the solicitor for the complainants in this cause, for the purpose of securing his professional services, to effect, if possible, a reduction of the burdensome assessments that were being made upon him under the said policy. Affiant further says that affiant's wife, upon her return,

informed him that said Mason had consented to represent affiant in the above stated matter; that said Mason stated that he would have affiant made a party complainant to the said bill, and would arrange to have the stipulation which he then had with Mr. Thomas Cratty, the solicitor for the defendant in this cause, to the effect that pending a hearing of the motion for an injunction no forfeiture of the policies of complainants would be declared, extended so as to cover affiant's policy. Affiant further says that the day prior to the last day for the payment of the October assessment, he again sent his wife to the office of Mr. Mason for the purpose of learning whether he could safely rely on his policy remaining in force if he did not pay the assessment then due, and affiant says that his, affiant's wife, took with her enough money to pay the assessment in case Mr. Mason informed her that the payment of the said assessment was necessary. Affiant further says that on her return, affiant's wife informed him that Mr. Mason had said that he had had affiant made a party complainant in the suit, and had had the stipulation with Mr. Thomas Cratty extended so as to cover affiant's policy; that affiant need not pay the assessment then due; that the said stipulation would extend the payment of said assessment and all subsequent assessments pending the hearing of the motion for an injunction, and that affiant need give the matter no further attention until he heard further from said Mason. Affiant further says that he is informed and believes that Mr. Mason did have the said stipulation extended so as to cover affiant's policy. Affiant further says that he is informed and believes that Mr. Mason did have affiant made a party complainant in the said suit, and did have the said stipulation extended so as to cover affiant's policy. Affiant further says that he is informed and believes, that on or about the 30th day of December, A. D. 1895, the motion for an injunction was heard and denied, and that on said day prior to the entry of the order denying the motion for an injunction a stipulation was entered into between Mr. Mason, representing the complainants, and Mr. Cratty, representing the

defendants, which, in terms, granted to the complainants ten days in which to pay the back assessments. Affiant further says that he received no notice from Mr. Mason or any one representing him, of the denial of the motion for an injunction, or the existence of the stipulation last mentioned, or its terms and conditions, until a few days ago the affiant's present solicitor learned the facts from an inspection of the records of this court, and from an interview with Messrs. Holmes and Sheldon, the gentlemen who now represent the complainants in this cause. Affiant further says that he has at all times been desirous of preventing a forfeiture of his said policy, and that on account of his advanced age and feeble condition of health it would be impossible for him to secure life insurance if his policy was permitted to lapse. Affiant further says that he has no property or means, and that unless said policy is continued in force, his family will be left penniless at his death.

W. B. SMITH.

Subscribed and sworn to before me this 16th day of March, A. D. 1896.

FRANK J. GAULTER,
Clerk."

"Augusta Smith, being first duly sworn, deposes and says that she is the wife of William B. Smith, one of the complainants in the above entitled cause; that shortly after the filing of the original bill in said cause, at the request of her husband she went to the office of Mr. William B. Mason, the solicitor for the complainants, and there had an interview with Mr. Mason in reference to his representing her husband in an effort to secure a reduction of the burdensome assessments which were then being made against her husband under his policy in the said Mutual Reserve Fund Life Association of New York. Affiant further says that Mr. Mason then informed her that he would arrange to have her husband made a party complainant in the above entitled suit, and that he would arrange to have the stipulation then in force with Mr. Thomas Cratty, which stipulation provided that the defendants would not declare a forfeiture of any

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of the policies of any of the complainants pending the hearing upon the application for an injunction, extended to cover the policy of affiant's husband. Affiant then and there stated to Mr. Mason that her husband was in feeble health and was very anxious to avoid anything that would work a forfeiture of his policy. Affiant further says that the day before the last day upon which the payment of the October assessment should be made, affiant again went to the office of Mr. Mason, and there stated that she was prepared to pay the assessment then due, and would do so if he (Mr. Mason) recommended it. Affiant says that Mr. Mason then informed her that it would be entirely unnecessary for her to pay the assessment; that he had arranged to have the stipulation afore-mentioned extended to cover her husband's policy. Affiant says that Mr. Mason also then informed her that it would be unnecessary for herself or her husband to give the matter any further attention until they were called upon to do so by him; that the stipulation then in force would not only cover the October assessment, but all assessments made before the application for an injunction was decided, and that when it became necessary for her or her husband to take any further steps to protect his rights, that he (Mr. Mason) would advise them what to do. Affiant further says that she received no notice from Mr. Mason or any one representing him at or about the time of the order denying the motion for the temporary injunction, and that the first information she had upon the subject was secured within the last few days by her husband's present solicitor after an investigation of the records of this court.

AUGUSTA SMITH. \

Subscribed and sworn to before me this thirteenth day of March, A. D. 1896.

WILLIAM B. BRYAN,
Notary Public."

March 16, 1896, the parties appeared in court, and appellant, by its counsel, protested against the court hearing oral evidence on the application, for the reason that there was no written pleading, but merely an oral motion based on affidavits; but the judge said he would treat the motion

and affidavits as a proper petition, and would permit appellant's counsel to introduce any testimony he saw fit, or file any plea, if filed that day, and that the only testimony would be as to whether the health of appellee, who was seeking to be reinstated in the company, was any worse than when the bill was filed, and the court proceeded to hear oral evidence in support of the application. The court, April 15, 1893, rendered its decision, and April 23, 1893, a decree was entered to the effect that the policy of appellee was not forfeited, and that appellant should reinstate him in all his rights, upon payment by him of all assessments due up to the date of the decree, with legal interest, or upon tender of said amount, etc. Appellant, April 19, 1896, after the hearing of the evidence, filed what purports to be an answer to the affidavit of appellee, and April 30, 1896, filed an amended answer. In both answers all right of exception is reserved, and objection made that there is no pleading on the part of appellee. It is too thoroughly settled to admit of controversy that every decree in chancery in favor of a complainant must be based on a bill or petition as its foundation. Proofs without allegations are as insufficient to support a decree as allegations without proofs. *Walters v. Defenbaugh et al.*, 90 Ill. 241, 244; *Dinwiddie v. Bell et al.*, 95 Ib. 360, 366; *Farrar v. Payne et al.*, 73 Ib. 82, 89; *Morris v. Tillson et al.*, 81 Ib. 607.

The cases, too numerous for citation, holding that, to warrant a decree for the complainant, the allegations and proofs must correspond, sufficiently illustrate the necessity of a bill or petition containing proper allegations.

Neither of the affidavits filed in support of appellee's motion can be considered as a pleading. Neither prays any relief whatever. Appellee's counsel, in the notice of the motion to appellant's counsel, treated them merely as affidavits in support of the oral motion which he intended to make. The decree rendered is not even in accordance with the motion which appellee's counsel gave notice he would make, and which, presumably, he made. The notice was of a motion to have the stipulation extended; the decree assumes that appellee's membership had been forfeited for

Brand v. Kleinecke.

non-payment of assessments, and purports to restore him to membership. The decree is not incidental to the main object or scope of the bill, and can not, therefore, rest on a mere motion.

The Supreme Court, in the opinion quoted, *supra*, say: "The stipulation and its provisions, and the duties and obligations of the parties, were distinct from the general subject of the litigation. Only the appellee and the appellant association were parties to the controversy." We fully concur with the court in this view, and consider it decisive that appellee's remedy, if any, was by bill, and not by mere motion. Appellant's counsel seems, originally, to have been of the same opinion, because, at the time of serving notice of the motion he also served on appellant's counsel a copy of a bill in which it was alleged, among other things, that appellee's policy had become forfeited, and praying for reinstatement, etc., which bill was not filed.

There being no proper pleading to support the decree, we deem it inexpedient to discuss the question whether, if there were such pleading, the evidence is sufficient to entitle appellee to relief against a forfeiture of his certificate of membership in the association.

The record shows that the bill of Elliott et al. v. appellant was dismissed April 19, 1897.

The decree will be reversed.

Rudolph Brand, Mary Keller, and Peter Van Vlissingen,
Trustee, v. Albert H. Kleinecke, Ella Kleinecke,
William H. Carnright, Charles E. Cruik-
shank, Fred H. Atwood, William
Heinemann, Trustees, and
Charles R. Stave.

77	269
102	120

1. RECORDS—*What is Not a Part of.*—Where notices and affidavits, no part of a bill or any pleading, are copied into the transcript of the record by the clerk, there being nothing in the record to show that they were ever called to the attention of or considered by the court, they constitute no part of the record and will be disregarded.

2. **EQUITY PRACTICE—*Motion to Dismiss Bill upon a Tender of Amount Due.***—A motion to dismiss the bill for foreclosure upon the tender of the amount due and its payment into court, amounts to a demurrer to the bill, admitting all facts well pleaded in the bill, and also to an admission by the defendants that there is due to the holder of the notes and deed the amount tendered.

3. **SAME—*Decree, Must be Sustained by the Record.***—Where there is no evidence preserved to sustain the decree, it must be reversed.

4. **TENDER—*In Foreclosure Suits.***—If the defendants desire to make payment of the amount due, so as to avoid further cost and expense, they should offer to pay all amounts due under the conditions of the mortgage and (if so provided) a reasonable solicitor's fee for the service already performed.

Bill to Foreclose a Trust Deed.—Trial in the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Hearing and bill dismissed upon the deposit of a tender, etc. Error by complainant. Heard in this court at the March term, 1898. Reversed and remanded. Opinion filed July 21, 1898.

STATEMENT OF FACTS.

Plaintiffs in error Brand and Van Vlissingen filed their bill in the Circuit Court of Cook County September 18, 1897, to foreclose a trust deed given February 1, 1894, by defendants in error Albert H. and Ella Kleinecke, on certain real estate in Cook county, to said Van Vlissingen, as trustee, to secure their principal note of \$4,000, due in five years from that date, bearing interest at the rate of six per cent per annum, payable semi-annually, and evidenced by ten interest coupons of \$120 each. The bill alleges, among other things not necessary to consider, that prior to September 2, 1896, Brand was and still is the legal owner and holder of said notes and trust deed; that on that day he received \$1,957.76, the proceeds of insurance upon buildings upon said premises, and indorsed that amount on the principal note, thereby reducing the principal indebtedness to \$2,042.24, and each coupon proportionately from \$120 to \$61.26; that the first six coupons have been paid and canceled, but the coupon due August 1, 1897, remains wholly unpaid, and \$61.26 is due thereon; that the principal note and trust deed provide that on default in making any payment of interest for thirty days the principal shall, at the

Brand v. Kleinecke.

election of the legal holder, become immediately due, such election to be made at any time after said period of thirty days without notice; that by reason of default in the payment of said coupon due August 1, 1897, for more than thirty days, said Brand has elected to declare, and has declared, and hereby does declare said principal sum of \$2,042.24, and the principal note evidencing the same at once due and payable; that said trust deed provides that in case of default or breach of covenant, the trustee, in his own name or otherwise, may file a bill to foreclose the same, and thereupon there should be due ten per cent on the amount of principal and interest for solicitor's fees, which sum was made so much additional indebtedness secured by the trust deed; and that under the terms of said trust deed it became necessary to expend and said trustee had expended, \$8.50 of title, and \$81 for costs and attorney's fees for abstract of counsel, employed by him in a condemnation proceeding, in order to protect the interests of the holder of said indebtedness secured by the trust deed.

The bill has the usual prayer for process, answer, accounting, and for foreclosure and sale in default of payment of amount found due, and has attached thereto, as exhibits, copies of the principal note, coupons and trust deed. Service of summons was had on all the defendants, and afterward, on September 29, 1897, the bill was amended by joining Mary Keller as a co-complainant, alleging that about July 2, 1897, said Keller, by agreement with Brand, became the beneficial owner of said principal note, coupons and trust deed, though they still remain in the hands of Brand, were never delivered to said Keller, and said Brand continued to be and still is the legal holder of the same, and also modified the prayer of the bill by asking a personal decree in favor of Keller instead of Brand.

October 4, 1897, upon motion of the Kleineckes, it appearing to the court they had deposited with the clerk of the court the sum of \$61.88, the court ordered that the bill be dismissed at complainants' costs, and that execution issue for the same.

October 8, 1897, complainants moved to vacate the order

dismissing the bill, which was overruled December 6, 1897. To reverse this action of the chancellor this writ of error is prosecuted.

WILLIAM W. CASE, attorney for plaintiffs in error.

M. SALOMON, attorney for defendants in error A. H. and E. Kleinecke.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

There is no certificate of evidence, and nothing in the record outside the bill and amendment, to show on what the chancellor based his action in dismissing the bill, or in refusing to set aside such order of dismissal. Certain notices and affidavits, no part of the bill or any pleadings, are copied into the transcript of the record by the clerk, but there being nothing in the record to show that they were ever called to the attention of, or considered by the court, they constitute no part of the record and must be disregarded. *Ames v. Stockhoff*, 73 Ill. App. 427, and cases cited.

The motion to dismiss the bill upon the tender of \$61.88 and its payment into court, amounts, in the first place, to a demurrer to the bill, admitting all facts well pleaded in the bill, and, in the second place, to an admission by defendants in error that there was due to the holder of the notes and deed that amount. *Vieley v. Thompson*, 44 Ill. 9; *Hickey v. Stone*, 60 Ill. 461; *Emerson v. R. R. Co.*, 75 Ill. 176; *Sweetland v. Tuthill*, 54 Ill. 215; *Monroe v. Chaldeck*, 78 Ill. 430; *Fuller v. Brown*, 167 Ill. 294.

The allegations of the bill show that complainants have rights which are the subject of equitable cognizance, and they are, by the motion to dismiss, admitted to be true, and therefore complainants are entitled to a decree of foreclosure. According to the bill \$61.26 for interest was more than thirty days overdue when it was filed, on account of which the legal holder of the note, as he had a right to do under the terms of the principal note and trust deed, had elected to, and had declared the principal note due and pay-

able. These facts being admitted, it also followed, under the terms of the trust deed, that complainants were entitled, on filing the bill, to ten per cent on the amount due for solicitors' fees.

As stated, the tender of \$61.88 by defendants in error was a further admission that this amount was due, and even if this tender could have the effect of obviating the action of the legal holder of the principal note in declaring it due also, still the complainants would be entitled to recover the expenses incurred in protecting their rights in the condemnation proceedings, and at least a reasonable solicitors' fee in this proceeding. It does not appear that any of these latter items were tendered or offered to be paid by defendants in error. In the Fuller case, *supra*, in which all amounts claimed to be due, including costs, except the reasonable solicitors' fee secured by the trust deed, were tendered and deposited with the clerk of the court, it was held that "if the defendants desired to make payment of the amount due, so as to avoid further cost and expense, they should have offered to pay a reasonable solicitors' fee for the services already performed," and a decree of foreclosure was affirmed. This, we think, is decisive of the case at bar on this point.

Moreover, there should be evidence in the record, the bill being sufficient on its face, to support the order or decree of the court dismissing the bill, and in this regard it is incumbent on the party seeking to sustain the action of the court to preserve the evidence in the record. As we have seen, no evidence was preserved to sustain the decree, and it must be reversed. Baird v. Powers, 131 Ill. 67; Ryan v. Sanford, 133 Ill. 298; Jackson v. Sackett, 146 Ill. 655, and cases cited in each.

These considerations make it unnecessary to consider the other matters argued by counsel. The decree is reversed and the cause remanded.

Joseph C. Hartzell v. Everett M. Warren.

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1. **APPEALS—From Interlocutory Orders.**—The right of appeal from an interlocutory order is purely statutory, and in order to give the Appellate Court jurisdiction, the statute (Ch. 22, Sec. 52) must be followed. The party taking such an appeal must give bond, to be approved by the clerk of court below, etc.

2. **SAME—Duty of the Trial Court.**—The court below has nothing to do in the way of granting appeal from an interlocutory order, nor of fixing the time within which the bond shall be given, its amount or approval. The statute fixes the time and manner of taking the appeal, and the bond must be approved by the clerk of the court below. Unless the statute in these respects is followed, this court acquires no jurisdiction.

3. **SAME—Duty of the Court Where it Has No Jurisdiction.**—Where it appears that the court is without jurisdiction, it becomes its duty, *sua sponte*, to dismiss the appeal.

Appeal, from an interlocutory order of the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the March term, 1898. Dismissed. Opinion filed May 26, 1898.

MORTON CULVER, attorney for appellant.

MORAN, KRAUS & MAYER, solicitors for appellee.

MR. JUSTICE WINDES delivered the opinion of the court.

Appellant has in this case tried to perfect an appeal to this court from an interlocutory order of injunction, entered by the Superior Court of Cook County on December 28, 1897, by praying an appeal from such order on the day it was entered, which was allowed by the Superior Court upon appellant filing an appeal bond in the sum of \$250 within twenty days from the entry of the order, and by filing such bond, and having it approved by the court on the 3d day of January, 1898. Praying the appeal and having a time fixed by the court within which to file an appeal bond was unnecessary, and the approval of the bond by the court was a fruitless act. The right of appeal from such an interlocutory order is purely statutory, and in order to give this court jurisdiction of the case, the statute must be followed.

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The statute of this State (Ch. 22, Sec. 52) provides that "the party taking such appeal shall give bond, to be approved by the clerk of the court below," etc. The court below has nothing to do by way of granting the appeal nor fixing the time within which the bond shall be given, its amount or approval. The statute fixes the time and manner of taking the appeal, and the bond must be approved by the clerk of the court below. Unless the statute in these respects is followed, this court acquires no jurisdiction, and can not, therefore, legally give any consideration to the questions argued by counsel. *Alles Plumbing Co. v. Alles*, 67 Ill. App. 252 and cases cited; *Sidway v. Amer. Mort. Co.*, Id. 24; *Commerce Vault Co. v. Hurd*, 73 Ill. App. 107.

When it appears the court is without jurisdiction, it becomes its duty, *sua sponte*, to dismiss the appeal, which is done. *Wright v. People*, 92 Ill. 596; *Hart v. Burch*, 31 Ill. App. 22.

Appeal dismissed.

Frank Guzinski v. The People of the State of Illinois.

1. **EVIDENCE—Of Good Character.**—Evidence of good character is proper to be considered by a jury in connection with all the other evidence in the case in passing upon the question of the guilt or innocence of a defendant in criminal cases.

2. **CHARACTER—Evidence of—When 'Competent.'**—Evidence of good character is competent evidence in favor of the defendant as tending to show that he would not be likely to commit the crime alleged against him in the indictment.

3. **SAME—Proper to be Considered with Other Evidence—Instructions.**—The rule is that evidence of good character is proper to be considered by the jury in connection with all the other evidence in the case, in passing on the question of the guilt or innocence of the defendant, but it is not the duty of the court to peremptorily instruct the jury that if they have any doubt, however whimsical, it is their sworn duty to find the defendant not guilty, if good character has been proved.

4. **MEASURE OF PROOF—In Criminal Cases.**—In criminal cases a person accused of crime is always presumed to be innocent until his guilt is established by evidence, and the mere fact that he has been indicted

can not be construed as evidence of his guilt; to authorize a conviction, his guilt must be established beyond a reasonable doubt. A mere preponderance of the evidence is not sufficient.

Indictment, for an assault. Trial in the Criminal Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Verdict of guilty. Error by defendant. Heard in this court at the March term, 1898. Affirmed. Opinion filed July 21, 1898.

L. B. LANGWORTHY, attorney for plaintiff in error.

MR. JUSTICE ADAMS delivered the opinion of the court.

Plaintiff in error was found guilty of an assault with a deadly weapon with intent to commit bodily harm, and was sentenced to confinement in the House of Correction for one year, and fined \$25. No question is presented as to the sufficiency of the indictment. The alleged errors relied on in the argument of his counsel are that the verdict is against the weight of the evidence, and that the court erred in refusing an instruction asked by plaintiff in error. The first question is one of fact, and we can not say, after carefully reading and considering the evidence, that it does not fully justify the verdict. The instruction, the refusal of which is complained of, is as follows:

10. "The court instructs the jury that if you believe from all the evidence that the facts and circumstances proved and relied upon by the prosecution to establish the guilt of the defendant are in doubt, then, if the defendant has, by the evidence, satisfied you that he was possessed of a good character up to the time of the offense alleged in the indictment in this case, the presumption of law is that the alleged crime is so inconsistent with the former living of the defendant that he would not have committed such a crime, and it would be the sworn duty of the jury to find the defendant not guilty."

The instruction is, in substance, that if the jury were in doubt as to the facts and circumstances "proved and relied on by the prosecution," etc., and if they were satisfied that the defendant, prior to the time when the offense is alleged to have been committed, "was possessed of a good char-

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acter," it was their sworn duty to acquit. We can not understand how the jury could be in doubt as to facts and circumstances "proved." There may be a doubt as to whether a fact is proved, but proof of the fact would seem to exclude doubt. The rule is that evidence of good character is proper to be considered by the jury in connection with all the other evidence in the case, in passing on the question of the guilt or innocence of the defendant, but we do not understand that it is the duty of the court to peremptorily instruct the jury that if they have any doubt, however whimsical, it is their sworn duty to find the defendant not guilty, if good character has been proved. The court properly refused the instruction.

The court gave to the jury the following, among other instructions:

"The court instructs the jury that the evidence of good character is competent evidence in favor of the defendant as tending to show that he would not be likely to commit the crime alleged against him in the indictment; and if the jury believe from all the evidence that prior to the alleged commission of the alleged crime, the defendant has always borne a good character as a peaceable man among his acquaintances and in the neighborhood where he lived, this is a fact to be considered by the jury, with all other evidence in the case, in determining the question whether the witnesses who have testified to facts tending to criminating said defendant, had been mistaken and have testified falsely or truthfully."

"The court instructs the jury that in law the accused is always presumed to be innocent until his guilt is established by evidence, and that the mere fact that the defendant has been indicted can not be construed as evidence of his guilt, and to authorize a conviction, his guilt must be established beyond a reasonable doubt. A mere preponderance of the evidence is not sufficient."

"The court instructs the jury that a reasonable doubt is that state of the case which, after the entire comparison of the consideration of all the evidence, leaves the minds of

the jury in such a condition that they can not say that they feel an abiding conviction to a moral certainty of the truth of the charge. And if from all the evidence such a state exists, then the defendant should be acquitted."

Legally, if not grammatically, the jury was fully and fairly instructed.

The judgment will be affirmed.

Marian Hooper v. Mary Dawson McCaffery et al.

1. **APPELLATE COURT PRACTICE—*Failure to File Briefs.***—For a disregard of Rule 20 requiring printed briefs in all cases, the court orders that unless the plaintiff in error print and file a brief as required by the rule, within twenty days, the writ of error be dismissed.

Error, to the Circuit Court of Cook County. Heard in the Branch Appellate Court of the First District at the October term, 1897. Dismissed unless, etc. Opinion filed June 2, 1898.

EDWIN WALKER, E. J. FARBER and PILLSBURY & ADAMS,
attorneys for plaintiff in error.

E. H. GARY, attorney for defendants in error.

PER CURIAM.

The published rules of this court require that briefs shall be filed in all causes here, and that they shall "contain a short, clear statement of the points and authorities in support thereof."

There has been in this record a disregard by the plaintiff in error of the requirement of the rule in that behalf, and what was said in *Anonymous*, 40 Ill. 59, might properly be applied. "Had this been an appeal, or had a supersedeas been granted, we should have dismissed the cause, on account of the neglect on the part of the counsel for the plaintiff in error to comply with the rules of this court in regard to the preparation of the cause for a hearing."

White v. Sisters of Charity.

The case is one of great importance, and demands of counsel that they set down a clear and distinct statement of the points upon which they rely, with the authorities in support thereof immediately following.

It is not enough that the argument be printed and filed, unless it shall contain a clear and distinct statement, such as is the proper purpose of a brief. *Gillespie v. Rout*, 40 Ill. 58; *Gochenour v. Mowry*, 40 Ill. 57.

For want of a proper brief by the plaintiff in error, we shall dismiss the suit unless her counsel shall print and file a brief, as required by the rules, within twenty days from the date of filing this opinion.

If within said twenty days a proper brief shall be filed on behalf of the plaintiff in error, the cause will be then continued at the cost of the plaintiff in error, with leave to defendants in error to file, on or before the second day of next term, such additions to their brief and argument already filed as to them may seem necessary to meet such brief of the plaintiff in error; the cost of printing such additional brief and argument by the defendant in error also to be taxed as costs against the plaintiff in error.

William B. White v. The Sisters of Charity, etc.

1. APPELLATE COURT PRACTICE—*Failure to File Printed Briefs.*—For a disregard of Rule 20, requiring printed briefs in all cases, the court orders the appeal dismissed, unless briefs are filed within a day named, etc.

Appeal, from the Superior Court of Cook County. Heard in the Branch Appellate Court of the First District, at the March term, 1898. Dismissed unless, etc. Opinion filed June 2, 1898.

GEORGE W. PLUMMER, attorney for appellant.

RICHARD PRENDERGAST and J. E. DEAKIN, attorneys for appellees.

PER CURIAM.

By Rule 20 of this court it is provided that "printed briefs will be required in all cases. * * * The briefs should contain a short, clear statement of the points, and the authorities in support thereof.

In *Hooper v. McCaffrey*, at this term of this court, we said: "There has been in this case a negligent disregard by the plaintiff in error of the requirement of this rule." That is most emphatically true in this case, and we refer to the opinion there given and the authorities there cited. It is unnecessary to repeat them here.

For want of a brief by appellant this appeal will be dismissed at appellant's cost unless his attorneys shall file on or before June 22, A. D. 1898, printed briefs such as are required by the rules of this court. If such briefs are filed within that time, the cause will be then continued at appellant's cost, with leave to appellee to file, on or before the second day of the next term of this court, such additional brief and argument as to attorneys for appellee may seem necessary to meet such brief of appellant; the cost of printing such additional brief and argument also to be taxed as costs against appellant.

John Spry Lumber Co. v. James McMillan and Ernest C. Wetmore.

1. *AGENTS—Sale on Credit to—Principal Bound.*—If one sells on credit to the agent of a known principal, knowing him to be such agent, and purchasing as such, the legal presumption, in the absence of evidence to the contrary, is that the credit is given to the principal and not the agent, and that the latter is not liable.

2. *SAME—When He Becomes Personally Liable.*—The agent becomes personally liable only when the principal is not known, or when there is no responsible principal, as where the agent becomes liable by an undertaking in his own name, or when he exceeds his power.

3. *SAME—Burden of Proving that Credit Was Given to the Agent.*—The burden of proving that credit was given exclusively to the agent is upon the party alleging it.

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4. *SAME—When Authority to Purchase on Credit Will Be Implied.*—Authority to build a house necessarily implies authority to purchase the lumber.

Assumpsit.—For lumber sold and delivered. Trial in the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Finding and judgment for defendant. Error by plaintiff. Heard in this court at the October term, 1897. Reversed and remanded. Opinion filed May 26, 1898.

OLIVER & MECARTNEY, attorneys for plaintiff in error.

MARSTON, AUGUR & TUTTLE, attorneys for defendants in error.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

The plaintiff in error, an Illinois corporation, sued the defendants in error in assumpsit for lumber claimed to have been delivered to the agent of defendants and used in the construction of two houses on the lands of defendants. The cause was tried by the court, without a jury, by agreement of the parties. The court found the issues for the defendants and rendered judgment on the finding.

The defendants were the owners of certain real property in the city of Chicago, known as McMillan and Wetmore subdivision, each owning an undivided half interest in the property. William A. Merigold, doing business under the name of W. A. Merigold & Co., was their agent, and had charge of the said subdivision, of which the McMillan and Wetmore fourth addition in Crawford, sometimes called the Crawford subdivision, formed a part. Merigold was authorized by the defendants to sell the lots at a price and on terms agreed on by the defendants, and remit the purchase money to Detroit, Michigan, where the defendants resided.

There was an arrangement between the defendants and Merigold by which, when a prospective purchaser desired to purchase a lot and have a house built on it, Merigold would inform them of the kind of house wanted, the estimated cost of it, and the terms of the proposed sale, when,

if they approved of the cost, terms, etc., they would authorize him to go on and build at an expense not exceeding the estimated cost. Two persons, named Peel and Duff, each desiring to purchase two lots with a house on them, the defendants authorized Merigold to build a house on the lots contracted for by the former at a cost of \$1,425, and on the lots contracted for by the latter at a cost of \$1,375. Merigold employed E. Weirsum, a carpenter, to build the houses. It does not appear that there was any written contract with Weirsum, but it appears from Weirsum's evidence that his sole compensation for building was to be and was the difference between the actual cost of the labor and material and the estimated cost of the houses as above stated. Weirsum got the lumber for the houses from plaintiff in error, and as it was delivered, receipts for it were signed by Weirsum or his foreman. These receipts read, "Received from John Spry Lumber Co., Chicago, for W. A. Merigold & Co.," etc. The lumber was used in the houses constructed for Peel and Duff, and plaintiff has never been paid for the same, and the lots, with the houses on them, were sold by Merigold for the defendants. Plaintiff knew before the delivery of the lumber that the defendants were the owners of the subdivision, and that Merigold was their agent.

Before any of the lumber was delivered George Spry, the plaintiff's secretary and treasurer, called at Merigold's office and had a conversation with Fred W. Fonda, Merigold's bookkeeper and financial man. Spry testified in relation to that conversation as follows:

"Q. What did Mr. Fonda say? A. Well, Mr. Fonda said that Wetmore and McMillan, of Detroit, owned this land, and that they were building the houses for them; that Merigold & Company were their agents and they wanted the material billed to them because they were the agents, so that they would be sure and know about all the debts, so that they wouldn't pay a part of it and then have liens filed for the other part. They wanted to be sure everything was paid up that went into the houses."

Fonda testified: "All I remember about our conversa-

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tion was that, in some way, I told him Merigold would be responsible for the lumber that went into the houses."

The lumber was charged to W. A. Merigold & Co. on the plaintiff's books. It appears from the evidence that in July, 1893, Merigold failed. About the time of his failure, George E. Spry wrote to defendant Wetmore the following letter:

"CHICAGO, July 13, 1893.

MR. E. W. WETMORE, ft. of Meldrum St., Detroit, Mich.

DEAR SIR: It is with great regret we notify you that your agents, Messrs. W. A. Merigold & Co., were this afternoon closed up by the sheriff. We have been furnishing lumber for houses to be put up on your subdivision, which Merigold & Co. handled for several years, and we still have a balance of \$1,617.49 which is now due. I saw Mr. Fonda this afternoon, who was Merigold & Co.'s cashier, and he gave me your address and said we had best write you about it. Mr. Fonda will O K our bill, and I sincerely trust you will send us a check for this amount. I sincerely hope you won't force us to protect ourselves by filing a lien, as they are expensive for both sides.

Hoping to hear from you promptly in regard to this matter, I remain,

Respy. yours,

GEO. E. SPRY, Treas."

Wetmore answered as follows:

"VICTORIA HOTEL, CHICAGO, July 15, 1893.

JOHN SPRY LUMBER CO.

GENTLEMEN: I've just come over to look up the affairs and my standing with Merigold & Co.

It looks as though it would take some time, but trust some arrangement can be made in the near future to meet obligations.

Yours,

E. G. WETMORE."

Spry further testified that, soon after receiving the last letter, he saw Mr. Wetmore, who said that if he, Spry, could prove that the lumber was used in the buildings on his land he would pay for it; and afterward he again, in company

with Weirsum, the carpenter, met Mr. Wetmore; that Weirsum produced his book and showed Mr. Wetmore that the lumber went into the buildings, and that Wetmore then refused to settle; that he said he would not feel it so much if he had not been caught so heavily by Merigold. Wetmore testified that he did not agree to settle; that the substance of what he said was, that if they (he and McMillan) were legally liable for the bills, they would pay them.

The contention of the defendants is that exclusive credit was given by plaintiff to Merigold & Co., and therefore they are not liable to pay for the lumber.

When the defendants authorized Merigold to build the houses, they, by necessary implication, authorized him to purchase the necessary material with which to build them, and the purchase of such material was, in legal contemplation, as if made directly by the defendants. The defendants, however, contend that the plaintiff gave exclusive credit to Merigold. If one sells on credit to the agent of a known principal, knowing him to be such agent, and purchasing as such, the legal presumption, in the absence of evidence to the contrary, is that the credit is given to the principal and not to the agent, and that the latter is not liable. *Mechem on Agency*, Sec. 555; *Story on Agency*, 263; 2 *Kent's Comm.*, Sec. 630, 12th Ed.; *Dunton v. Chamberlain*, 1 Ill. App. 361; *Whitney v. Wyman*, 101 U. S. 392; *Guest v. Burlington Opera House Co.*, 74 Ia. 457; *Meeker v. Claghorn*, 44 N. Y. 349; *Hall v. Lauderdale*, 46 Ib. 70, 74; *Ferris v. Kilmer*, 48 Ib. 300, 305; *Foster et al. v. Persch*, 68 Ib. 400.

Kent states the rule thus: "The agent becomes personally liable only when the principal is not known, or when there is no responsible principal, as where the agent becomes liable by an undertaking in his own name, or when he exceeds his power."

In *Whitney v. Wyman*, *supra*, the court say: "Where the principal is disclosed, and the agent is known to be acting as such, the latter can not be made personally liable unless he agreed to be so."

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In *Dunton v. Chamberlain*, *supra*, the court held that, the principal being known, and that the agent was acting as agent, in order to hold the agent personally liable, it would be necessary to prove an express promise by the agent.

In *Hall v. Lauderdale*, *supra*, the court say: "Where the agency is disclosed, and the contract relates to the matter of the agency, and is within the authority conferred, the agent will not be personally bound, unless upon clear and explicit evidence of an intention to substitute, or to super-add his personal liability for or to that of the principal."

In *Ferris v. Kilmer*, *supra*, the court say: "Where one sells goods to an agent of a known principal the presumption is that he gives credit to the principal and not to the agent, and to shift the responsibility from the principal to agent, the proof should be satisfactory that the vendor sold upon the credit of the agent alone."

The burden of proving that credit was given exclusively to the agent is upon the party alleging it. *Meeker v. Claghorn*, *supra*, 352.

The fact that the lumber was charged to Merigold & Co. on the plaintiff's books is relied on as evidence that exclusive credit was given to Merigold & Co. This fact, even if unexplained, would not be conclusive evidence that exclusive credit was given to the agent. *Foster et al. v. Persch*, and *Guest v. Burlington Opera House*, *supra*.

In the present case the reason why the lumber was so charged appears, by Spry's testimony, quoted *supra*, to have been that Fonda requested that it should be so charged. This evidence tends to show the lumber was charged to Merigold & Co. for their convenience in keeping their books.

Fonda does not deny Spry's evidence that he, Fonda, requested that the lumber should be so charged. His testimony that all he recollects is that, in some way, he told Spry that Merigold would be responsible, is unimportant, first, because it does not appear that he had any authority to so state, and, secondly, even if he had such authority, it would

not be evidence that plaintiff credited Merigold exclusively. We regard the evidence insufficient to prove that exclusive credit was given to Merigold & Co. Counsel for defendants in error further contend that Merigold was not authorized by the defendants to purchase lumber on credit. The authority was, as before stated, to build (which necessarily implied authority to purchase the lumber). And Wetmore testified that the money for the houses was to come out of collections in Chicago, on account of the subdivision, Merigold being the agent of the defendants for the sale of lots in the subdivision. This certainly did not limit Merigold & Co. to strictly cash purchases. Merigold, being authorized absolutely to build, had authority to build immediately in anticipation of future collections. Besides, it does not appear that credit was given in the sense in which the word credit is used among merchants. It appears from the receipts in evidence that the first load of lumber was delivered March 27th, and the last, May 30th next, and there being no evidence to the contrary the presumption is that the sale was for cash, payable when all the lumber was delivered. A purchase of lumber, price payable when all delivered, can hardly be said to be a purchase on credit. *Proctor v. Tows*, 115 Ill. 138, relied on by counsel for defendants, is not applicable to the facts in the present case.

Lastly, it is claimed that the lumber has been paid for by the defendants. Wetmore testified that the defendants had paid for the houses. On cross-examination he explained this statement by saying that Merigold & Co. had charged the houses to defendants in his account with them. He says the charge went in as a debit, and the balance generally was a balance after taking those houses into consideration. In other words he claims that the mere fact that Merigold charged defendants with the cost of the houses operated as a payment to plaintiff for the lumber. Bookkeeping may make debts appear paid, but no system of bookkeeping has yet been devised which can pay them. The learned judge of the Circuit Court, in deciding the case, may have been unconsciously influenced by the fact that until after Meri-

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gold's failure, plaintiff made no demand on defendants for payment. It is probably true that if Merigold had not failed he would have paid for the lumber from moneys collected on sales of lots for the defendants, and that, consequently, no demand would ever have been made on the defendants by the plaintiff; but this consideration does not in the least affect the question of the liability of the defendants, which is to be determined precisely as if Merigold had not failed, all the circumstances bearing on that question having transpired before Merigold's failure.

The judgment will be reversed and the cause remanded,

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1. CONSTRUCTION OF STATUTES—*Sec. 11, Relating to the Letting of Contracts.*—Sec. 11, of the act to create sanitary districts, etc. (Hurd's Statutes 1896, page 833, Sec. 853), providing that all contracts for work to be done by such municipality, the expense of which will exceed \$500, shall be let to the lowest responsible bidder, has no application to a hiring by the Sanitary District of Chicago of pumps and employees to be used by its chief engineer in the doing of work which it had directed the engineer to do.

2. MUNICIPAL CORPORATIONS—*Expending Money in Excess of Appropriations.*—A person employed by the proper officer of a municipal corporation, and who, under such employment, does work for the corporation, can not be held responsible because the officer employing him expended money in doing such work, in excess of the amount authorized.

3. SAME—*Estoppel by its Officers.*—A municipal corporation may be estopped by the acts of its officers.

Assumpsit, for services, etc. Trial in the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Jury waived and cause submitted to the court. Finding and judgment for defendant. Appeal by plaintiff. Heard in this court at the October term, 1897. Reversed and judgment entered for plaintiff in this court.

DUPEE, JUDAH, WILLARD & WOLFE, attorneys for appellant.

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The unauthorized acts of municipal officers are regarded as the acts of the corporation, provided the acts are performed by that branch of the municipal government which is vested with jurisdiction to act for the corporation upon the subject to which the particular act relates. *Thayer v. City of Boston*, 19 Pick. 511; *Buffalo and Hamburg Turnpike Co. v. City of Buffalo*, 58 N. Y. 639; *Chicago v. McGraw*, 75 Ill. 570; *Dillon on Municipal Corp.*, Sec. 764.

F. W. C. HAYES and SEYMOUR JONES, attorneys for appellee.

Any positive acts by municipal officers which may have induced the action of the adverse party, and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had done, will work an estoppel. *Roby v. The City of Chicago*, 64 Ill. 447; *Chicago, Rock Island and Pacific Railroad Co. v. City of Joliet*, 79 Id. 39; *Logan County v. City of Lincoln*, 81 Id. 156.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

Appellant sued appellee in assumpsit. The declaration contains the common counts. Appellee pleaded the general issue. The cause was tried by the court, without a jury, by agreement of the parties. The court found the issues for the appellee and judgment was rendered accordingly. The facts are substantially as follows:

The chief engineer of appellee reported to appellee as follows:

“CHICAGO, August 30, 1893.

TO THE HONORABLE, THE BOARD OF TRUSTEES OF THE SANITARY DISTRICT OF CHICAGO:

GENTLEMEN: In the matter of experimentation upon the difficult material on the McArthur Brothers' sections, I would recommend that a test of the erosive power of pumps working under high pressure be made upon this material. If it can be removed by hydraulic erosion, as I believe it can, it will make an economical method of handling the

material. I have made some investigation of the expense which would be attendant upon the experiments. We should have to hire two high-power pumps and purchase several hundred feet of pipe, and hire two tugs for steaming purposes, which, together with the amounts for labor and the freight, foots up \$1,000. To make the estimate of cost liberal I have added \$500 to this. This is the proposition which was discussed before certain members of the board by Mr. Cutter, of the Chicago Hydraulic Dredge Company. A successful test would have a marked effect on the question of letting this work at reasonable prices, and therefore I feel justified in making this recommendation.

Respectfully submitted,

(Signed)

ISHAM RANDOLPH,
Chief Engineer."

On this report coming before appellee's board of trustees, the recommendations of the report were concurred in by the board, and the chief engineer was authorized and directed by the board to make the test as provided in the report, at an expense not to exceed \$1,500.

September 4, 1893, appellant addressed to Benezette Williams, a civil and consulting engineer, who had charge of the proposed test under the direction and superintendence of Isham Randolph, the chief engineer, the following communication:

"CHICAGO, September 4, 1893.

"MR. BENEZETTE WILLIAMS, C. E., 602 Security Building,
Chicago.

DEAR SIR: This is to confirm proposition just made to you for the use of three (3) pumps and man to erect and run same, as follows:

We will furnish to you f. o. b. cars this city two (2), of our No. 10 or 16 x 10 x 16 single piston pumps and one (1) 16 x 10½ x 12 duplex piston pump, and furnish one man to superintend the setting up of these pumps, you to pay us for the use of these three pumps and the man's time \$42.50 per day for each day pumps are away from this store; it

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being understood that you are to put these pumps into just as good condition when through using them as they are when taken from the store. That is, if any repairs are necessary to put them into a salable condition, and if pumps need painting, you are to pay us just what it costs for doing this work.

These pumps with man to superintend erection of same we could furnish you immediately upon receipt of your order.

Yours very truly,

KNOWLES STEAM PUMP WORKS,
Robert W. Gray."

The Blake Manufacturing Company is a corporation, and did part of its business in the name of the Knowles Steam Pumping Works, which concern is not a corporation, and is owned by the Blake Manufacturing Company.

Appellant's communication appears to have been handed to Mr. Randolph, and was answered as follows:

"CHICAGO, September 7, 1893.

KNOWLES STEAM PUMP WORKS, 163 South Canal Street, City.

GENTLEMEN: Please deliver upon the order of Mr. Ben-zette Williams, three pumps in accordance with your propo-sition to him dated September 4th. Make bill against this district and submit to him for approval.

Yours respectfully,

ISHAM RANDOLPH,
Chief Engineer."

Inclosed to appellant with the last communication was the following:

"CHICAGO, September 8, 1893.

KNOWLES STEAM PUMP WORKS, 163 South Canal Street, City.

GENTLEMEN: In harmony with your proposition of Sep-tember 4th, to furnish three (3) pumps for an experiment on the Sanitary District Channel, I send you an order from Mr. Isham Randolph, chief engineer of sanitary district, which explains itself. This you also consider an order from me to furnish said pumps in accordance with your propo-sition.

Very truly yours,

BENEZETTE WILLIAMS."

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By the direction of Williams, appellant, September 9, 1893, delivered the three pumps on board the C. & A. R. R., consigned as directed by Williams. Appellee received the pumps. They were away from appellant's place of business twenty-eight days, and appellant also furnished a man to appellee, whose time with appellee was seventeen days. The charge per day for each pump was \$12.50 or \$37.50 per day for the three pumps, and the charge for the man was \$5 per day, being \$42.50 per day for man and pumps, as per appellant's proposition of September 7th, *supra*. After the pumps were returned, appellant, in accordance with the direction of Mr. Randolph in his communication to appellant of September 7th, *supra*, made out its bill and submitted it to Williams for his approval. The bill and approval thereof are as follows:

"CHICAGO, October 23, 1893.

SANITARY DISTRICT OF CHICAGO, Chicago.

Bought of KNOWLES STEAM PUMP WORKS,
163 South Canal St., Chicago.

To use of 3 pumps on Drainage Canal, 28 days at \$37.50 per day.....	\$1,050.00
C. H. Soper's services, running same 17 days at \$5 per day.....	85.00
Frt. on pumps and piping fr. sag. bridge.....	16.00
Ctg. " " to store when returned.....	12.00
1 No. 10 F. C. valve seat compl. to replace broken one.....	\$5.00
Express on same.....	75
Expense delivering piping, hose and fittings, team- ster's bill.....	8.00
Labor bill.....	4.00
Packing bought for pumps.....	1.80
Expense putting pumps in order and painting at store.....	18.00
	<hr/>
	\$1,200.55

Correct as per proposition of September 4th.

May 18, 1894.

BENEZETTE WILLIAMS."

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It was proved that the bill was correct. Defense to the claim of appellant was made on two grounds: first, that the contract between the parties was void because not let to the lowest bidder; and, secondly, because appellee expended, in making the test, about \$1,496.30 in excess of the amount of appellant's bill.

The first objection is based on section 11 of the sanitary district law, the part of which relied on in support of the objection is as follows:

"Section 11. All contracts for work to be done by such municipality, the expense of which will exceed \$500, shall be let to the lowest responsible bidder therefor upon not less than sixty days' public notice of the terms and conditions upon which the contract is to be let having been given by publication in a newspaper of general circulation published in said district, and the said board shall have the power and authority to reject any and all bids and re-advertise," etc. 2 S. & C. Stat., 2d Ed., p. 1494.

The objection is untenable. No contract was let to appellant to do any work. Appellant's pumps and employe were merely hired by appellee to be used by its chief engineer in the doing of work which appellee directed the engineer to do. The statute has no application to such a hiring. In legal contemplation, appellee itself did the work of making the test. Appellee put in evidence bills showing that it had expended in making the test \$1,496.30, exclusive of appellant's bill, but there is not a particle of evidence that, prior to contracting with appellant for its pumps and employe, it had expended a cent or made any binding contract for that purpose. It is not, and can not successfully be claimed that appellee had not the power to make the test, so that when the contract of hiring was made with appellant, it was a valid and binding contract. Appellee's board of trustees was authorized by section 4 of the statute to elect a chief engineer and to prescribe his duties. The chief engineer, Mr. Randolph, was directed to make the test in question. It is apparent from his report to the board that pumps were necessary with which to make it,

and it is also apparent that some one having sufficient knowledge to superintend the setting up and operation of the pumps was necessary. Mr. Randolph, having lawful authority, hired from appellant the pumps and a man to superintend them, and kept the former twenty-eight days and the latter seventeen days, and now it is claimed that because appellee expended some \$1,496 for other labor and material used in making the test, appellant's bill should not be paid. Mr. Randolph, appellee's chief engineer, was appellee's executive officer in making the test, and the evidence shows that it was made under his superintendence and direction. He kept the pumps and appellant's employe doubtless till the test was complete, and appellee has had the benefit of the pumps and the services of the employe. There is no evidence that appellant had any knowledge or notice that there was any limitation of expense in the order of the board of trustees directing the test, and even if appellant had had such knowledge, it could not have prevented the incurring by appellee of expense in excess of the limitation. It appears from the evidence that the bills, exclusive of appellant's bill, amounting in all to \$1,496.30, were paid by warrants, which must have been issued by the proper officer or officers of the board of trustees, after approval of the bills by the board. The defense is wholly inequitable, and should not prevail unless there is some inexorable, unyielding rule of law to prevent a recovery by appellant. We are, happily, ignorant of any such rule.

Mr. Randolph was the agent and executive officer of appellee in making the test, and he having retained, for the purpose of the test, appellant's pumps and employe, and appellee having had the full benefit thereof, it is estopped to set up in defense of appellant's claim the want of power of its agent in the premises. *County of Cook v. Harms*, 108 Ill. 151, 164, and cases cited.

In *Chicago v. C. & W. Ind. R. R. Co.*, 105 Ill. 72, the city claimed that certain acts of the mayor and police, on which the railroad company relied, were unauthorized, and therefore not binding on the city, but the court say: "We

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recognize the doctrine to be that the unauthorized acts of municipal officers are regarded as the acts of the corporation, provided the acts are performed by that branch of the municipal government which is vested with jurisdiction to act for the corporation upon the subject to which the matter relates."

In *Sexton v. Chicago*, 115 Ill. 230, it appeared that a draughtsman in the office of the superintendent of buildings, who had charge of the plans of a building which the city was about to erect, and in regard to which it had advertised for bids, handed to Sexton, who was a contractor and desired to make estimates for the purpose of bidding on the work, a tracing which purported to be, but was not, a correct tracing of an original plan. Sexton made a contract with the city, and the work, as shown by the original plan, being more costly than that shown by the tracing on which he figured, a dispute arose between him and the city as to which he was bound by—the original or the incorrect tracing—and the court held that his contract only bound him to do the work by the tracing, saying: "The city owed the duty to have a competent person in charge of this office, and to see that he discharged his duty. His act in handing out plans and tracings was its act. There is nothing new in thus holding a municipality responsible for the want of fidelity of those who act for it. Such suits are of daily occurrence."

In *City of Chicago v. Roth*, 26 Ill. 456, Roth, a carpenter, sued the city for compensation for work done by him, under the direction of the street commissioner, in constructing street crossings. The city defended on the grounds that the appropriation was exhausted, and the street commissioner had been twice notified by the city comptroller, before Roth was employed, not to employ any more men. The court held that Roth was entitled to recover, saying: "The laborer was employed by the proper officer of the city, and under such employment did the work for the city, and if the agent of the city disobeyed the lawful orders of the city authorities to suspend the work on the streets, the offi-

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oer and not the laborer is responsible for such disobedience," etc.

In *Martel v. City of East St. Louis*, 94 Ill. 67, the court say: "Any positive acts by municipal officers which may have induced the action of the adverse party, and when it would be inequitable to permit the corporation to stultify itself by retracting what its officers had done, will work an estoppel."

That a municipal corporation may be estopped by the acts of its officers is recognized in *Logan County v. City of Lincoln*, 81 Ill. 159; *People ex rel. etc. v. Town of Anna*, 67 Ib. 59; *Hitchcock v. Galveston*, 96 U. S. 351, and numerous other cases. In view of the authorities cited and the facts in evidence, the act of Mr. Randolph, appellee's chief engineer and agent, must be deemed to have been the act of appellee, and therefore appellee is liable as per its contract with appellant.

The judgment will be reversed, and the cause having been heard by the court without a jury, and there being no controversy as to the amount of appellant's bill, namely, \$1,200.55, judgment will be entered here in favor of appellant and against appellee for that amount, and appellant's costs of this court.

Judgment reversed and judgment for appellant here.

Morris Rosenbaum et al. v. E. G. Dawes, Trustee, for use of Farmers' Savings Bank.

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179	112
77	295
118	62

1. **CHATTEL MORTGAGES**—*Possession of the Mortgaged Property—Sale by Mortgagor—Mortgagee's Remedy.*—When, by the terms of a chattel mortgage, the mortgagor is entitled to the possession of the mortgaged property until default is made in the payment of the mortgaged debt, until such default the mortgagee has neither the right of property nor the right of possession, and until then the mortgagor may sell the property, but the purchaser will take only the mortgagor's interest. The

remedy of the mortgagee is to follow the lien of his mortgage in the hands of the vendee.

2. *SAME—Acknowledgment and Record in Other States—Constructive Notice to Citizens of This State.*—The constructive notice of a mortgage resulting from its acknowledgment and recording in the State in which it is executed, is also constructive notice in our State, and to its citizens, when the mortgaged property is removed to this State.

3. *SAME—Rule Making Acknowledgment and Record in Other States Constructive Notice to Citizens in This State, Criticized.*—The courts base this rule on the doctrine of interstate comity, but it seems to this court that the doctrine should not be extended to the detriment of citizens of this State. In many cases the rule that citizens of this State are bound by constructive notice of a chattel mortgage executed and recorded in another State, necessarily and inevitably operates to the detriment of such citizens.

4. *DEMAND—Must Be Made on the Defendant While the Property Is in His Possession.*—The demand in replevin must be made on the defendant while the property is in his possession. His ability to comply with it is necessary to give the demand force and effect.

5. *SAME—Demand and Refusal Do Not Make a Conversion.*—A demand and refusal do not constitute a conversion; they are, at the most, but evidence of a conversion.

TROVER.—Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Finding and judgment for plaintiff. Appeal by the defendant. Heard in this court at the October term, 1897. Reversed. Opinion filed June 29, 1898.

MORAN, KRAUS & MAYER, attorneys for appellants.

In an action of trover, the plaintiff must show not only a tortious conversion of the personal property by the defendant, but also, that at the time of the alleged conversion, plaintiff had the right of property, general or special, in the chattels converted, and also the possession, or a right to the immediate possession thereof. Davidson v. Waldron, 31 Ill. 120-129; Forth v. Pursley, 82 Ill. 152-154; Owens v. Weedman, 82 Ill. 409-417; Montgomery v. Brush, 121 Ill. 513-523; Frink v. Pratt, 130 Ill. 328-331; Stock Yard Co. v. Mallory, 157 Ill. 554-561; Lapp v. Pinover, 27 Ill. App. 169-171; Parker v. Rodes, 79 Mo. 91; Blain v. Foster, 33 Ill. App. 297-298; Dunning v. Fitch, 66 Ill. 51.

Under the law of Missouri, until default or condition broken, a trustee or mortgagee has no right of either pos-

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session or ownership in the mortgaged property, and the mortgagor, until such default and condition broken, has an interest in the property which he can transfer by sale. *Barnett v. Timberlake*, 57 Mo. 499-501; *Hickman v. Dill*, 32 Mo. App. 509-516-17; *Buddington v. Mastbrook*, 17 Mo. App. 577-579; *Sheble v. Curdt*, 56 Mo. 437-439; see also *Holladay v. Bartholomae*, 11 Ill. App. 208.

While personal property remains in the possession of the mortgagor, and there is no condition of the mortgage broken, the mortgagor's interest being subject to levy and sale, a purchaser obtains a title which he can lawfully sell, and no claim arises against him in favor of the mortgagee by reason of such sale. *Hathaway v. Brayman*, 42 N. Y. 322-324; *Hamill v. Gillespie*, 48 N. Y. 556-8; *Bowers v. Bodley*, 4 Ill. App. 279-281.

Demand and refusal are, at most, evidence of a conversion; but in order to have even that effect, it must appear that the thing demanded is in the possession of the party upon whom the demand is made, at the time of making such demand. *Dearborn v. Un. Nat. Bk.*, 58 Me. 273-4; *Hawkins v. Hoffman*, 6 Hill, 538; *Frome v. Dennis*, 45 N. J. Law, 515-520; *Haddix v. Einstman*, 14 Ill. App. 445; *Kime v. Dale*, 14 Ill. App. 308; *Howitt v. Estelle*, 92 Ill. 218; *Hayes v. Mass. Life Ins. Co.*, 125 Ill. 626; *Bruner v. Dyball*, 42 Ill. 34; *Hanchett v. Williams*, 24 Ill. App. 57.

JOHN MAYO PALMER, ROBERTSON PALMER and RICE & McCLANAHAN, attorneys for appellee.

By a chattel mortgage the property is conditionally conveyed to the mortgagee, and is only in the permissive possession of the mortgagor, which the mortgagee may terminate for condition broken; and whoever derives possession of the property from the mortgagor while the mortgage is in force, whether before or after condition broken, does no more than succeed to the rights of the mortgagor, and holds such possession in subordination to the rights of the mortgagee. The mortgagee, therefore, has all the remedies against such person for the recovery of the specific property, or its value, as he would have had against

the mortgagor. *Bailey v. Godfrey*, 54 Ill. 507; *Arnold v. Stock*, 81 Ill. 407; *Pike v. Colvin*, 67 Ill. 227; *Durfee v. Grinnell*, 69 Ill. 371; *Beach v. Derby*, 19 Ill. 617; *Simmons v. Jenkins*, 76 Ill. 479; *Close v. Hodges*, 44 Minn. 204; *Shepard v. Barnes*, 3 Dak. 148; *Brewing Co. v. Pillsbury*, 5 Dak. 62; *National Bank v. Morris*, 114 Mo. 255; *National Bank v. Morris*, 125 Mo. 343; *Udell v. Slocum*, 56 Ill. App. 216; *Cassidy v. Elk Grove Land Co.*, 58 Ill. App. 39; *Frink v. Pratt*, 130 Ill. 332.

The general title to mortgaged property is in the mortgagee; he is entitled to immediate possession of the property to hold it until condition broken, unless the parties otherwise stipulated in the mortgage; without such agreement, the possession of the mortgagor (if suffered to retain the property) is deemed the possession of the mortgagee, so that he may reduce the property to possession at any moment, and may maintain a trespass, trover or replevin, as the case may be, for any intermeddling with or taking of the property by a third party while in the possession of the mortgagor, equally as though the actual possession was in himself. *Tannahill v. Tuttle*, 61 Am. Dec. 480.

The application of the mortgaged chattels to the payment of a debt other than that secured by the mortgage, was such a violation of the rights of the mortgagee, as amounted to tortious conversion by the mortgagor; and the appellants by aiding him in the commission of this tort are equally guilty with him of a conversion. *Cooley on Torts*, 450, and cases cited.

The action of trover lies in favor of one entitled to the possession of personal property at the time the suit is brought to recover the value of such property from one who has converted it to his own use in derogation of the rights of one thus entitled to possession. And the right to maintain the action is not in any way affected by the circumstance that the defendant is not in possession at the time demand is made or suit brought. *Sharp v. Parks*, 48 Ill. 511; *Udell v. Slocum*, 56 Ill. App. 216; *Cassidy v. Elk Grove Land Co.*, 58 Ill. App. 39.

One who has come lawfully into the possession of per-

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sonal property, but has parted with such possession to another, can not escape liability in an action of trover, unless upon demand made he then places his refusal upon that ground. *Udell v. Slocum*, 56 Ill. App. 216; *Cassidy v. Elk Grove Land Co.*, 58 Ill. App. 39.

Where a mortgagor, before condition broken, transfers the possession of mortgaged chattels to another, the possession of such other being rightful when acquired, a demand for possession by the mortgagee is necessary after his right of possession accrues as an assertion of his right; and a refusal to recognize that right is a conversion as against him, and not mere evidence of conversion.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment rendered in an action of trover by appellee against the appellants, Morris Rosenbaum, Joseph Rosenbaum, Charles Haas and Henry Klopfer, partners under the firm name of Rosenbaum Bros. & Co. The declaration contains one count in trover, in the usual form, for 200 head of cattle of the value of \$3,000. Appellants pleaded the general issue, and the cause, by agreement of the parties, was tried by the court, without a jury. The court found the issues for appellee and rendered judgment for appellee for \$1,709.78 and costs.

December 24, 1892, C. D. Hudson executed to the Farmers' Savings Bank, in Marshall, in the State of Missouri, a promissory note which, with the indorsements thereon, is as follows:

15831.

"MARSHALL, Mo., December 24, 1892.

Eight months after date I promise to pay to the order of Farmers' Savings Bank eight thousand dollars, for value received. Negotiable and payable at the Farmers' Savings Bank, in Marshall, Mo., with interest from maturity at the rate of eight per cent per annum until paid, and if interest be not paid annually, it shall become part of the principal and bear the same rate of interest.

Due Aug. 24-93.

C. D. HUDSON.

\$8,000.00."

Indorsed on the back :

"Protest waived.

JAS. S. GORDON, Pr.

This note is allowed against estate of C. D. Hudson for the sum of twenty-two hundred and fifty-four dollars and seventy cents (\$2,254.70).

JAMES COONEY,

Assignee of C. D. Hudson.

Credited this 26th March, 1894, with distribution by assignee of \$157.82, being 7 per cent.

Credited March 15-95, with distribution by assignee \$25.15."

To secure payment of the note Hudson, at the same date, executed to appellee a chattel mortgage, in the form of a trust deed, of 150 head of two and three-year old native feeding steers, then on Hudson's farm near Mt. Leonard, Saline county, Missouri, which were, by the trust deed, warranted to be free and clear of incumbrances.

Dawes, the appellee, was named as the second party in the trust deed, and the Farmers' Savings Bank as the third party. The deed contained substantially the following provisions :

"Whereas, said Hudson is justly indebted to said bank as per said note of December 24, 1892, and agrees to pay taxes and properly feed and care for said steers as said bank cashier may determine; now, if said note and interest be paid when due and payable, deed shall be void and property released; but if default be made in payment of said note and interest when due, or failure to properly feed and care for said steers as said cashier may determine, then the legal holder of said note may at once declare the same due and sale at his option be had forthwith; or in the faithful performance of said agreement this deed shall remain in force, and second party (or in case of death, and a sale be desired by holder of note, the sheriff) may sell at public vendue to highest bidder, upon giving notice; and out of the proceeds shall pay costs and expenses of this trust and whatever may be in arrear and unpaid on note, remainder to first party."

By the statute of the State of Missouri, put in evidence

by appellee, it is lawful for the mortgagor or grantor in a deed of trust of personal property to retain possession of the property, if the instrument has been acknowledged or proved, and recorded in the county in which the grantor or mortgagor resides. The statute does not require that the instrument shall, in terms, provide that the mortgagor or grantor may retain possession. That the trust deed in question was properly acknowledged and recorded, is not controverted. August 2, 1893, Hudson, the grantor in the trust deed, being in possession of the cattle, shipped to Chicago to appellants, who were and are commission men engaged in selling cattle in the Chicago market, thirty-one head of cattle, thirty of which were cattle described in the deed of trust, one of which was a stag, not included in the deed. Prior to the last date Hudson had made two shipments to the appellants of cattle included in the trust deed, viz., twenty-two head shipped July 16, 1893, and forty-five head shipped July 25 or 26, 1893. Appellants sold and accounted to Hudson for the July shipments, and Hudson testified that they sold for about \$3,530. There is no controversy between the parties as to the July shipments, the controversy being solely as to the August, 1893, shipment. Appellant sold the August shipment, thirty-one head, August 3, 1893, and rendered an account of the sale to Hudson, showing the net proceeds to be \$1,502.08.

The parties, on the trial, stipulated as follows:

"First. That the following may be considered as facts in this case; that on August 3, 1893, the defendants received from the mortgagor, Hudson, the cattle in controversy in this suit, and that at that time neither any of the defendants, nor any of their agents, had any notice or knowledge as to the existence of the trust deed in evidence, or any other mortgage or lien upon any of the property here in controversy, other than that imputed to them by law on account of the recording of said deed of trust in Missouri; that on said August 3, 1893, the defendants in good faith sold the cattle here in controversy in open market to Nelson Morris & Co., then and still engaged in business in Chicago, Illinois, as

packers and feeders, buyers, sellers and dealers in cattle, for the sum of money shown on the sales account in evidence; and that it was never disclosed to the plaintiff or to the bank, to whom the cattle were disposed of by the defendants; that thereafter and on the same date they credited the proceeds of said sale to their account with Hudson, and that at the said time Hudson was and since then has continuously remained indebted to the defendants in a sum largely in excess of the amount received by the defendants on the sale of the cattle, so that after crediting said proceeds, Hudson still remained, and continuously since has remained indebted to the defendants; that on August 3, 1893, the defendants were and for years theretofore had been engaged in the business of selling cattle in Chicago as commission merchants; that they were acting as such commission merchants in selling the cattle in question," etc.

The president of the bank, James A. Gordon, testified that \$5,774.44 had been paid on the note, and that part of said payments consisted of a draft on appellants for \$3,500, which was deposited in the bank July 29, 1893, credited to Hudson, and applied on the note August 24, 1893, when the note matured. The same witness testified that he knew that Hudson had been in the habit of shipping cattle to Rosenbaum Bros. & Co., and that they were in the live stock commission business. It is a fair inference that the \$3,500 draft on appellants was drawn against the proceeds of the July shipments to appellants.

About the first part of October, 1893, Abiel Leonard, a director of the Farmers' Savings Bank, came to Chicago with a letter of introduction to appellants from Mr. Gordon, the president of the bank, and called on appellant Joseph Rosenbaum, and told him that he came to demand the cattle that the bank had a mortgage on, and which had been shipped by Hudson, and that Rosenbaum became angry and refused to discuss the matter with him. Leonard testified that before he left Missouri to come to Chicago, and when he made the demand for the cattle, he knew they had been shipped by Hudson to appellants and sold by ap-

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pellants, and that appellants had, in some way, accounted to Hudson for the proceeds of the sale. Prior to the 29th of July, 1893, the Farmers' Savings Bank discounted Hudson's note, which the trust deed was made to secure, in the Commercial Bank of St. Louis, and from the time it was so discounted until it matured, August 24, 1893, it was the property of the last named bank. Counsel agree that the rights of the parties depend on the law of the State of Missouri where the trust deed was executed, and counsel for appellee read in evidence the opinions of the following cases: National Bank of Commerce v. Morris, 114 Mo. 225; Lafayette Bank v. Metcalf, 40 Mo. App. 494; Same v. Same, 29 Mo. App. 384; and counsel for appellants read in evidence the opinions in the following cases: Hickman v. Dill, 32 Mo. App. 516; Turner v. Langdon, 85 Mo. 441; Barnett v. Timberlake, 57 Mo. 500, and the case in 29 Missouri, *supra*.

The trust deed contains no insecurity clause; that is, no provision that if the trustee or the bank should, at any time, feel insecure, possession might be taken of the property by the trustee or the bank. Only two cases in which such possession could be taken are provided for; one, if default should be made in payment of the note and interest when due; the other, failure to properly feed and care for the steers as the cashier of the bank might determine. The first contingency did not occur until August 24, 1893, twenty-one days after appellants had sold the cattle, and there is no claim that the second ever occurred. Was the sale of the cattle by appellants a conversion?

The facts in Lafayette Co. Bank v. Metcalf, 29 Mo. App. 384, read in evidence by appellee's counsel, were very similar to those in the present case. The mortgagors in that case executed to the bank a chattel mortgage of a lot of cattle and hogs, to secure the payment of their note to the bank for \$2,000, due six months after date. About a month before the maturity of the note, the mortgagors shipped the cattle to commission merchants in East St. Louis, in the State of Illinois, for sale, and the commission merchants sold them and accounted to the mortgagors for the pro-

ceeds of the sale. The action was against the commission merchants, and was, as the court say, in the nature of trover. The court say: "It is conceded that, at the time of the alleged conversion, the draft, or any part thereof, was not due. The possession then, at the time of the alleged conversion, by the very letter of the bond, was in the mortgagors. No rule of law is better settled than that the mortgagors, under such circumstances, have the title to the property, and having the possession they have an interest which they may sell, and may transfer the possession to the vendor. It is an interest which may be seized under process at the suit of another creditor of the mortgagor, and sold, and the purchaser will take the possessory right and the title of the mortgagor, subject, of course, to the lien of the mortgage," citing cases. In the case cited there was an express provision in the mortgage that the property should remain in the possession of the mortgagor until default in payment of debt and interest. But, as before stated, the statute of Missouri put in evidence by appellee, does not require that the mortgage shall contain such provision. The only section of the statute in evidence bearing on the question is as follows:

"No mortgage or deed of trust of personal property hereafter made, shall be valid against any other person than the parties thereto, unless possession of the mortgaged or trust property be delivered to and retained by the mortgagee or trustee, or *cestui que trust*, or unless the mortgage or deed of trust be acknowledged or proved and recorded in the county in which the mortgagor or grantor resides, in such manner as conveyances of lands are by law directed to be acknowledged or proved and recorded."

The trust deed in question, being of cattle on the grantor's farm, and he being required to properly feed and care for the cattle, we are of opinion that the trust deed provides, by necessary implication, that he shall remain in possession.

Hickman v. Dill, 32 Mo. App. 509, was replevin for wheat which had been mortgaged to secure payment of a promis-

sory note. There was no provision in the mortgage for the retention by the mortgagor of possession of the property, until default in the payment of the debt, no insecurity clause, and no provision for the taking possession by the mortgagee, except on default in payment of the note. Plaintiff, before the maturity of the note, brought replevin. The court say: "The weight of authority in the United States seems to maintain that the right to possession of mortgaged chattels rests in the mortgagee immediately upon the execution of the mortgage, if there be no express or implied stipulation in it to the contrary, whether the debt be due and payable or not. Jones on Chat. Mort., Sec. 426, and cases cited. Yet the decisions in this State hold that a trustee or mortgagee is not entitled to possession until after default made or condition broken," citing *Shelbe v. Curdt*, 56 Mo. 437, and *Barnett v. Timberlake*, 57 Mo. 499. The court, after holding, as in *Lafayette Co. Bank v. Metcalf*, *supra*, that a mortgagor in possession has an interest which he may sell, and which is subject to sale under legal process, say: "Under the law as thus established in this State, we must hold that, as the debt secured by the deed of trust was not due, and no forfeiture had occurred at the time the plaintiff instituted his suit, as against the mortgagor or his assignee, the plaintiff was not entitled to the immediate possession of the wheat, and could not reap a perfect success in his action of replevin."

In *Barnett v. Timberlake*, 57 Mo. 499, the plaintiff sued out legal process, and took from the defendant, property described in a trust deed, executed by the defendant to the plaintiff, to secure payment of a promissory note which had not yet matured. The court held that the plaintiff could not recover, saying: "The law is well settled, that, although a trustee or mortgagee of personal property is, after default made or condition broken, entitled to the possession, and considered in law the owner of the property thus mortgaged, yet, prior to that time, it is equally certain that no such right of either possession or ownership exists."

In each of the cases, *Lafayette Co. Bank v. Metcalf et*

al., 40 Mo. App. 424, and Nat. Bank of Commerce v. Morris, 114 Mo. 258, both of which cases are relied on by appellee's counsel, there was a provision in the mortgage entitling the mortgagee to immediate possession in case the mortgagor should sell or remove, or attempt to sell or remove the mortgaged property, and the cases, in that respect, are clearly distinguishable from prior Missouri cases, in which the mortgages contained no provision for possession by the mortgagee, except on default in the payment of the debt secured, and in which the court held that, until such default, the mortgagor and not the mortgagee was entitled to possession. In the case in 114 Mo. *supra*, the court uses this language: "Authorities of high character, including those cited by counsel for defendants, hold that until such option is exercised by the mortgagee, and he either so takes or demands the possession, the possession remains with the mortgagor until default made in the payment of the debt, and that a sale made by him before such default or assertion of right, will not support trover against the vendee or agent making the sale. Bank v. Metcalf, 29 Mo. App. 392; Skiff v. Solace, 23 Vt. 279; Hathaway v. Brayman, 42 N. Y. 325; Hammill v. Gillespie, 48 N. Y. 556; Cadwell v. Pray, 41 Mich. 307." And the court decided the case for the plaintiff (Ib. 265) on the express ground that a removal and sale of the property was contrary to the terms of the mortgage. We have examined the Vermont, New York and Michigan cases cited, *supra*, in the opinion of the Missouri court, *supra*, and find that they fully sustain the language above quoted from the opinion. In Hammill v. Gillespie, 48 N. Y. 556, the court say of mortgaged property which had been sold under an execution against the mortgagor: "It was not material to inquire how much the defendant obtained for the wheat and oats. He bought only the interest of Markle (the mortgagor), whatever that might be, subject to the mortgage. He could lawfully sell that interest again. Whether he received much or little, is of no consequence to the plaintiff. If he sold the whole title, he might be liable to the purchaser in case the grain

should be afterward taken from him under the mortgage, but that would be a question in which the plaintiff would have no concern." In the same case, the court held that no wrong was done to the plaintiff, the mortgagee, by the sale; that he still might pursue his lien under the mortgage. In *Durfee v. Grinnell*, 69 Ill. 371, the court, p. 373, say: "Had there been no provision in the mortgage allowing the mortgagees to reduce the property to possession, and the mortgage, by its terms, had authorized the mortgagor to hold the property until the maturity of the notes, then the interest of the mortgagor could have been seized and sold under execution, at any time before the debts fell due, and the purchaser would have succeeded to all of the rights, but no more than the debtor held in the property, nor would the mortgagees have had any power to prevent the sale. The law authorizes a sale in such a case in despite of the creditor," etc. The language of the court in the above quotation, namely, "and the mortgage, by its terms, had authorized the mortgagor to hold the property until the maturity of the notes," is used with reference to the statute of this State, which, in terms, requires that "the instrument shall provide for the possession of the property to remain with the grantor." But we have already shown that the Missouri statute in evidence does not so require, and the Missouri Court of Appeals, in *Hickman v. Dill*, cited *supra*, expressly held that such a provision in the mortgage is not necessary to the retention of possession by the mortgagor, and, in our opinion, this is a correct construction of the Missouri statute in evidence. *Simmons v. Jenkins*, 76 Ill. 479, is to the same effect as *Durfee v. Grinnell*, *supra*.

The rule deducible from the authorities cited is that when, by the mortgage, the mortgagor is entitled to the possession of the mortgaged property until default in the payment of the secured debt, the mortgagee has not, before such default, either the right of property or of possession; and, until such time, the mortgagor may sell, the purchaser taking only his (the mortgagor's) interest, and the remedy of the mortgagee is to follow the lien of his mortgage in

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the hands of the vendee. At the time of the sale in question, the note secured by the mortgage had not matured; there had been no default on the part of the mortgagor; he had lawful right to sell, therefore the sale was not a conversion. But, even though it should be conceded that the sale was a conversion, appellee could not recover in trover, because, at the time of the sale, August 3, 1893, neither appellee nor the Farmers' Savings Bank had any right of property, general or special, in the mortgaged property, or any right to the possession of it. In *Stock Yards Co. v. Mallory, etc., Co.*, 157 Ill. 560, the court say: "In an action of trover, which is a possessory action, the plaintiff must recover upon the strength of his own title and not upon the weakness of his adversary's title; and he must show not only a tortious conversion of the personal property by the defendant, but also that, at the time of the alleged conversion, he had the right of property, general or special, in the chattels converted, and also the possession or the right to the immediate possession thereof," citing a number of prior decisions of the Supreme Court.

But appellee's counsel contend that the failure of appellants to deliver the cattle on demand made by Abiel Leonard on Joseph Rosenbaum, was a conversion. "The demand must be made on the defendant while the property is in his possession. His ability to comply with the demand is necessary to give the demand force and effect." *Cobbey on Replevin*, Sec. 476; *Cooley on Torts*, 2d Ed., Sec. 454, top p. 532; *Wells on Replevin*, Sec. 375; *Davis v. Buffum*, 51 Me. 160; *Dearbourn v. Un. Nat. Bank*, 58 Ib. 274; *Hill v. Belasco*, 17 Ill. App. 194.

The demand was made in October, 1893; the cattle had been sold the previous August, and both Leonard, who made the demand, and the Farmers' Savings Bank, knew that appellants had sold the cattle, and had ceased to have any control over them. But appellee's counsel contend that because Rosenbaum did not place his omission or failure to deliver the property on the ground that appellants had sold it, therefore his failure to deliver was a conversion; citing

Udell v. Slocum, 56 Ill. App. 216, and Cassidy v. E. G. Land Co., 58 Id. 43. In the former case the court say of a refusal to deliver on demand: "If the refusal to surrender was upon the ground that he had parted with the possession, he should have put it on that ground, so that the plaintiff might learn where to seek the property," etc. In the latter case the owners of stolen cattle applied to commission men who had sold them for information as to who the purchasers were. Neither case is applicable to the present case. Leonard, who made the demand, knew that the cattle had been sold, and he did not ask to whom they had been sold.

A demand and refusal do not constitute a conversion; they are, at the most, but evidence of a conversion. Cooley on Torts, Sec. 454; Cobbey on Replevin, Sec. 449; Wells on Replevin, Sec. 349; Hill v. Belasco, *supra*.

How the demand and alleged refusal could be held to be evidence of a conversion in the present case, in which, as we have shown, what was done prior to the demand was not a conversion, we can not perceive. In view of what has been said, we do not deem it necessary to pass specifically upon the errors assigned in relation to propositions of law held and refused. We can not conclude this opinion, however, without some suggestions as to the rule, apparently supported by numerous adjudications, that the constructive notice of a mortgage resulting from its acknowledgment and recording in the State in which it is executed, is also constructive notice in other States, and to the citizens of other States to which the mortgaged property may be removed, thus giving to the law of the State in which the mortgage is executed extra-territorial effect. The courts base this rule on the doctrine of interstate comity, but it seems to us that the doctrine should not be extended to the detriment of citizens of the State. In many cases the rule that citizens of this State are bound by constructive notice of a chattel mortgage executed and recorded in another State, necessarily and inevitably operates to the detriment of such citizens.

Chicago is one of the largest cattle markets in the world. In the case of the shipment of mortgaged cattle here for sale by commission men or brokers in open market, there is absolutely no protection for purchasers. If the prospective purchaser applies to the broker for information as to whether the cattle are incumbered, he can get none, because the brokers, like appellants in the present case, are ignorant of incumbrances. If he asks the shipper's name and residence, he finds that he lives in Texas or North Dakota, and if he can afford to wait and communicate with him, he will probably receive no information on the subject. He can not afford to visit the State and county from which the cattle were shipped to inspect the record. He is a farmer, and, taking the chances, buys the cattle in open market for the full market price, and takes them to his farm in McLean county to fatten them for remarketing—a thing of common occurrence. He feeds them for three or four months, when along comes the mortgagee with his mortgage, identifies and demands the cattle, and the farmer must either pay the mortgage debt or give up the cattle. Is it not a serious question whether interstate comity should be extended when its extension may lead to such consequences? In *Skiff v. Solace*, 23 Vt. 279, mortgaged property was removed from New York to Vermont, and attached in the latter State by a citizen of Vermont, and the court sustained, as against the mortgagee, the lien of the attaching creditor. In reference to recognizing the law of New York by comity, the court say: "But such recognition does not take place by any foreign State when it would be incompatible with its own authority, or prejudicial to the interest of its own subject." See also, *Story on Conflict of Laws*, Sec. 32, *et seq.*

The judgment will be reversed.

Robert T. Martin v. The People of the State of Illinois.

1. **DEPOSITIONS**—*Under Commission from a Foreign Court.*—Where a commission issues from a foreign court to a person not vested with judicial authority, the proceedings before him, in the absence of a statute, are voluntary.

2. **CONTEMPTS**—*Refusal to Appear Before a Notary and Testify.*—A Circuit Court has no authority to punish a person for contempt in refusing to obey its order to appear and testify before a notary acting under a commission from the District Court of Linn County, Iowa, to take the deposition of such person.

Contempt of Court.—Appeal from an order of the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the October term, 1897. Reversed. Opinion filed June 29, 1898.

STATEMENT.

By an order of the Circuit Court of Cook County, Illinois, the appellant, Martin, was found to be guilty of contempt of that court and was adjudged to pay a fine of \$10, and upon failure to so do was ordered committed to the county jail until the fine should be paid or he be otherwise discharged, etc.

A commission had issued from the District Court of Linn County, Iowa, to John C. Burchard, of Cook county, Illinois, as notary public and commissioner, to take the depositions of appellant and another to be used in a cause then pending in the Iowa court. Burchard had issued a subpoena, commanding appellant to appear before him as such notary public and commissioner, to answer the interrogatories which accompanied the commission. The subpoena was duly served, but appellant refused to obey. Thereupon Burchard caused notice to be served upon appellant to appear before the Circuit Court of Cook County, and that Burchard would apply to that court for an order upon appellant to obey the subpoena, etc.

Appellant filed an appearance in which it was recited that he appeared "for the sole purpose of objecting to the

jurisdiction of said Circuit Court." Thereupon the Circuit Court entered an order which is recited in the abstract, as follows:

"That said R. T. Martin be and appear before John C. Burchard, notary public and commissioner as aforesaid, at his office, room 47, number 115 Monroe street, at Chicago aforesaid, on Saturday, January 2, 1897, at the hour of two o'clock in the afternoon, and then and there testify to the truth in said suit pending in the said District Court of Linn County, Iowa, wherein R. D. Russell is complainant and Laura W. Walker is defendant, * * * and bring with him and produce at the time and place aforesaid all the receipts, or books or records showing anything with reference to a certain promissory note. * * * To the entry of which order, and each and every part of which, the said R. T. Martin objects and excepts."

Appellant did not obey this order, was ruled to show cause why he should not be committed for contempt, made an answer to the rule which, in effect, denied the jurisdiction of the court, and upon this answer was adjudged in contempt and fined.

From that order this appeal is prosecuted.

MORAN, KRAUS & MAYER, attorneys for appellant.

The power to punish for contempt is an incident to all courts of justice, independent of statutory provision. *The People v. Wilson et al.*, 64 Ill. 195; *Clark v. The People*, etc., 1 Ill. 340.

A contempt must be either to vindicate the authority or dignity of the court (a criminal contempt), or to enforce the omission or commission of an act necessary to the administration of justice in enforcing some private right (a civil contempt). *Lester v. People*, 150 Ill. 408; *The People v. Diedrich*, 141 Ill. 665; *Buck v. Same*, 60 Ill. 105; *Crook v. People*, 16 Ill. 534.

The offense complained of is not to enforce a private right of a party litigant, and must, therefore, be a punishment for something done or omitted in the presence of the

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court tending to impede or interrupt its proceedings, and is, therefore, and must, therefore, be (if a contempt at all) a criminal contempt. *Lester v. The People, supra*; *People v. Diedrich, supra*; *Leopold v. The People*, 140 Ill. 552; *Crooks v. The People, supra*; *Buck v. Buck, supra*.

But the contempt in the case at bar can not be construed to be a criminal contempt for the reason that it does not tend to hinder or delay the court in the lawful execution of its authority. *Stuart v. The People*, 3 Scam. 395; *De Beukelaer v. The People*, 25 Ill. App. 460, 464.

To be a punishable contempt, the contempt must have been committed in the court which seeks to punish such contempt. *Rapalje on Contempt*, Sec. 13; *People ex rel. County Judge*, 27 Cal. 151; *Ex parte Tillinghast*, 4 Peters (U. S.), 108; *Morris v. Whitehead*, 65 N. C. 637; *Lessee of John Penn, Jr., v. Messinger*, 1 Yeates (Pa.) 2; *Re Williamson*, 26 Pa. St. 9; *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 874, 884.

The court is without jurisdiction to enter the order complained of. *Puterbaugh v. Smith*, 131 Ill. 199; *In re Bushnell et al.*, 44 N. Y. Supp. 257.

H. S. & F. S. OSBORNE and ROBERT F. PETTIBONE, attorneys for appellees.

The power to punish for contempt is an incident to all courts of justice, independent of statutory provision. *People v. Wilson et al.*, 64 Ill. 195; *Clark v. People, etc.*, 1 Ill. 340.

Contempt is a willful disobedience of an order of court having jurisdiction of the person and of the subject-matter. *Leopold v. People*, 140 Ill. 552; *Burnham v. Stevens*, 33 N. H. 247.

Courts of one State or country have assisted those of another to obtain testimony to be offered in evidence in the latter State, from the time of Edward I. to the present, and have, for that purpose, upon proper notice, assumed jurisdiction of the person and of the subject-matter in the case of refusal of witnesses to testify. *Burnham v. Stevens*, 33 N. H. 247; *State v. Ingerson*, 62 N. H. 437; *Post v. R. R.*

Co., 144 Mass. 341; Keller v. B. F. Goodrich Co., 117 Ind. 556, 562; State ex rel. etc. v. Bourne, 21 Ore. 218; 1 Greenleaf on Ev. (13th Ed.) 367; Hall's Practice, 37; Mitford's Pleading, 186, note; 1 Rolle's Abr. 513, pl. 15, temp. Edw. I.

The entitling of the cause is of small moment. The court will consider the merits in any event. People v. Diedrich, 141 Ill. 665, 670.

MR. JUSTICE SEARS delivered the opinion of the court.

The question presented is whether the Circuit Court of Cook County, Illinois, could, either upon the doctrine of comity or under the provisions of our statutes, punish a witness as for contempt. who had refused to obey the subpoena of a notary public of the county, who had been commissioned by the District Court of Linn County, Iowa, to take the deposition of such witness.

Under the provisions of the statute, section 36, chapter 51, Rev. Stat., the court could not enter the order appealed from. That statute has been construed by the Supreme Court in Puterbaugh v. Smith, 131 Ill. 199; and so much thereof as might authorize such summary proceeding by the Circuit Court was by that decision declared unconstitutional. The court said: "Where a person refuses to appear before a notary public and give his deposition, in obedience to a subpoena issued by him, it may be truly said that he acts in contempt of the authority of the notary; but how can it be said that he thereby acts in contempt of the Circuit Court, or of the judge of that court? He owed, by reason of the service of the subpoena, no duty to the Circuit Court or to the judge thereof. As to the Circuit Court and its judge, his failure to obey the subpoena simply places him in the same situation as all other willful violators of the law. * * * It (the General Assembly) can not make that punishable as a contempt which, in the nature of things, can not be a contempt of the authority imposing the punishment. * * * But where an individual is being proceeded against in one tribunal for an act done in the presence and in derogation of the authority of a different tri-

bunal, the ability of the trial tribunal to exercise its proper functions is not involved. The act charged had no tendency to hinder or delay it in the lawful execution of its authority.

* * * Wherever there is a criminal prosecution, and that is always the case where the proceeding is an original one to have the party punished for a violation of a statute, the defendant is entitled under the Constitution to a jury trial. So much of the present statute, therefore, as authorizes the circuit judge to proceed summarily and without a jury, being contrary to the Constitution, is void, and not law."

Neither can the order in question be justified upon the doctrine of comity. It is true, as argued by counsel for appellee, that the courts of one jurisdiction will aid those of another in the obtaining of testimony. But not by such summary proceeding. Courts of chancery have frequently assumed jurisdiction to aid the prosecution of a civil suit in a sister State, and to that end have entertained bills of discovery. The decisions cited by counsel are in cases where jurisdiction was obtained either by the exhibiting of bills of discovery or under letters rogatory.

Where a commission issues from a foreign court to a person not vested with judicial authority, the proceedings before him, in the absence of statutes, are voluntary. Wharton on Conflict of Laws, 723; *In re Bushnell*, 44 N. Y. Supp. 257; *In re Searls*, N. Y. Court of Appeals, reported in the National Corporation Reporter, Vol. 16, p. 388.

We have a statute providing for the proceeding before such a commissioner, but the interpretation of that statute by our Supreme Court has been noted; and this order can not be sustained as "an original proceeding to have a party punished for a violation of the statute."

The order is reversed.

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1. **BANKS AND BANKING—*Recovery of Money Paid on a Raised Draft.***
—When money is paid upon a raised draft, without any negligence upon the part of the person paying the same, it can be recovered from the party to whom it was paid.

2. **INSTRUCTION—*To Find for Defendant, When Waived.***—An instruction to take a case from the jury, when presented with the other instructions, is waived.

3. **DEPOSITIONS—*Purpose of the Statute Requiring Exhibits to be Attached.***—The requirement of the statute that all exhibits produced to the officer taking the deposition, or which shall be proved or referred to by a witness, shall be indorsed and sealed up with the deposition, commission, and interrogatories, and directed to the clerk of the court in which the action shall be pending, etc., is for the protection of the parties interested, and to prevent any fraud or mistake by the substitution of papers not produced before the commissioner or referred to by the witness in his testimony.

4. **SAME—*Ataching Copies of Exhibits.***—Where the deposition of two witnesses was taken concerning an original draft, and one of them afterward testified at the trial concerning such draft, which was then produced and offered in evidence, the court will not suppress the deposition of the other witness because, instead of the original draft, a copy of it was attached to his deposition.

Assumpsit, to recover back money paid on a raised draft. Trial in the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the October term, 1897. Affirmed. Opinion filed June 29, 1898.

MORAN, KRAUS & MAYER, attorneys for appellant.

“Where a bank acts as agent in collecting paper that turns out to be raised, and it has paid over the money to its principal, suit lies against the principal, and not against the agent bank, by the party who has mispaid.” Morse on Banks and Banking, Vol. 2, Sec. 479, 2d Ed.; Mechem on Agency, Sec. 561; 1 Am. & Eng. Ency. of Law, 405; Smith v. Binder, 75 Ill. 492.

OTIS & GRAVES, attorneys for appellee.

Metropolitan Nat. Bank v. Merchants Nat. Bank.

MR. JUSTICE WINDES delivered the opinion of the court.

February 7, 1894, the Flour City National Bank of Minneapolis, by its cashier, A. A. Crane, for the sum of \$35.10, to it then paid, drew and delivered its draft for \$35 to Frank H. Harper, payable to his order and directed to appellee. The draft was also perforated "\$35\$."

February 13, 1894, this draft, changed in amount to \$3,500, and perforated "\$3,500\$," was presented to appellee for certification and acceptance, and the change not being apparent to the paying teller of appellee, he accepted it and the amount of \$3,500 was charged, on the books of appellee, to the Flour City National Bank. It does not appear by whom this change of the draft was made, but it was changed before its acceptance by appellee, and without the knowledge or consent of the Flour City National Bank. February 13 or 14, 1894, the draft as accepted and certified was deposited by Harper with the American Trust & Savings Bank of Chicago, and credited to his account. February 14, 1894, the draft was delivered by the American Trust & Savings Bank to appellant, and on that day appellee paid \$3,500 through the Chicago Clearing House to appellant for the draft. This amount was subsequently paid by appellant to the American Trust & Savings Bank, which still has the money. February 17, 1894, a question having arisen as to the correct amount of the draft, appellee's officers telegraphed to the Flour City National Bank, and having received an answer, went to appellant and made a demand that appellant redeem the draft, leaving the draft with appellant. On the same day appellant, by its second assistant cashier, returned the draft to appellee, with a letter stating that "American Trust & Savings Bank declines to redeem same. I will report matter to Mr. Keith early Monday morning. Kindly return receipt given you." February 19, 1894, which was the Monday referred to, a representative of appellee had an interview with Mr. Keith, appellant's president, who informed the representative that appellant could not redeem the draft because the American Trust & Savings Bank, under the advice of counsel, refused to re-

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deem it. At the time of these interviews appellee's president knew that appellant cleared for the American Trust & Savings Bank, and testified that the indorsement on the draft so indicated.

From February 14 to February 20, 1894, both days inclusive, it is uncontroverted that the American Trust & Savings Bank at no time had on deposit with appellant less than \$198,000, and on February 19, 1894, when appellant finally refused to redeem the draft, it had to the credit of the American Trust & Savings Bank \$288,018.77.

At the time of the transactions in question, appellee was the Chicago correspondent of the Flour City National Bank of Minneapolis, and the American Trust & Savings Bank, not being a member of the Chicago Clearing House, checks and drafts drawn upon or deposited with it were cleared through appellant, the same being received by appellant as deposits and credited to the American Trust & Savings Bank, against which account the latter drew.

After this draft was received by the American Trust & Savings Bank, indorsed by Harper, it was stamped with the following indorsement, viz: "American Trust & Savings Bank. Paid ——— Feby. 14, 1894. Paid through Chicago Clearing House to Metropolitan National Bank." There is evidence, by way of opinions of banking experts, tending to show that this indorsement has a significance peculiar to bankers in Chicago; that Chicago bankers generally understood it different from the common and ordinary meaning of the words, and to them it signified in this case that appellant was agent in the Clearing House of the American Trust & Savings Bank to collect the draft. There is also evidence of the same character tending to show that the indorsement has no such peculiar significance to Chicago bankers, and that its significance to them is not different to what it is to laymen or others.

When the draft was certified by appellee, the amount of \$3,500 was charged to the Flour City Bank, and was afterward credited back, but whether before or after this suit does not appear. The Flour City Bank disputed the right

of appellee to charge it over \$35, because of the change in the draft.

Appellee, on March 29, 1894, sued appellant in assumpsit to recover the difference between the draft as originally drawn and the amount of \$3,500, paid by it to appellant, declaring on the common counts. Appellant pleaded the general issue, and a trial before the court and a jury resulted in a verdict for appellee of \$4,003.52, and a judgment thereon, from which this appeal is taken.

It is claimed that the trial court erred in denying a motion of appellant, made some weeks prior to the trial and renewed when the case was called for trial, to suppress the depositions of Harry W. White and A. A. Crane, for the reason that in the depositions both these witnesses testified concerning the original draft, which was then produced and offered in evidence, but over the objection of appellant's attorneys a copy, instead of the original draft, was attached to the depositions. The deposition of White was not offered or read in evidence. On the trial he was called as a witness for appellee, identified the original draft, and testified that the body of the draft was in his handwriting, that he signed it, and as to the changes made in it after he had signed it. After this testimony, the draft was offered in evidence, and thereafter the deposition of Crane was offered and read. We are unable to see how appellant could in any way have been prejudiced by this action of the court. The requirement of the statute—that all exhibits produced to the officer taking the deposition, or which shall be proved or referred to by any witness, shall be indorsed and sealed up with the deposition, commission, and interrogatories, and directed to the clerk of the court in which the action shall be pending, etc.—is evidently for the protection of the parties interested and to prevent any fraud or mistake by the substitution of papers not produced before the commissioner or referred to by the witness in his testimony. We think that when the paper referred to by one witness, whose deposition was taken but not read in evidence, was proven on the trial and thereby made competent evidence in the case, there was no

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error in overruling the motion to suppress the depositions, nor in admitting in evidence the deposition of the other witness who referred in his deposition to the same paper.

It is also claimed that the court erred in refusing to allow appellant to show that in collecting the draft in question, appellant acted as the agent of the American Trust & Savings Bank, and that this fact was known to appellee.

We are inclined to think, from an examination of the evidence, that this fact was shown, and that appellee knew it on the day it demanded of appellant that it redeem the draft, but not before. The only evidence in this regard which it is claimed the court excluded, was an offer by appellant's attorney to show that appellee made a demand on the American Trust & Savings Bank February 17, 1894, for the payment of the draft in question. We think there was no reversible error in this ruling. The proffer was not to show that appellee had this knowledge prior to February 17th. It might be admitted that on this date appellee knew that appellant was the agent of the American Trust & Savings Bank in the collection of the draft, and it would be immaterial in determining appellant's liability for the proceeds of the draft. Whether appellant was agent or principal can make no difference, because, when demand was made on it by appellee for the payment of the draft, it had ample funds of the American Trust & Savings Bank with which to make the payment. The fact that appellant, when it collected the proceeds of the draft, at once credited the same to the American Trust & Savings Bank, is not important. It did not pay merely by making entries on its books. The account was a running account, and the balance on the books of appellant to the credit of the American Trust & Savings Bank was \$198,108.88 on February 17th, when demand was first made, and on February 19th, when appellant finally refused to redeem the draft, the balance was \$288,018.77. There is no claim that there was any specific payment of this collection by appellant to the American Trust & Savings Bank, and even if there was, the excluded evidence had no tendency to prove such payment.

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Moreover, the account of the American Trust & Savings Bank with appellant was not different from that of an ordinary depositor. The credits and payments were made generally, and in the case of this draft the indorsements were in no way restrictive, contained no notice that appellant acted as agent, the opinions of experts to the contrary notwithstanding, and passed the title from the American Trust & Savings Bank to appellant. The money when paid by appellee became the money of appellant, and it was responsible to appellee whether it paid the proceeds of the draft to the American Trust & Savings Bank or not. As to appellee, the appellant was a principal, and if not a principal it had ample funds of the principal in its hands with which to pay the draft. 2 Morse on Banking, Sec. 574; Rhodes v. Jenkins, 18 Colo. 49; Ogden v. Benas, 9 Law Rep., C. P. 513; Nat. Park Bank v. Eldred Bank, 90 Hun, 286.

In the latter case the facts were quite similar to the one at bar. The court said: "The draft in question was indorsed absolutely to the Eldred Bank, and it directed its collection for its account, thereby assuming the place of principal as far as the plaintiff was concerned. If it was acting as collecting agent only, as it now claims, such agency was not disclosed to the plaintiff at the time of the transaction, and it had the right to rely upon the responsibility of the defendant as owner of the draft in paying the same. Such being the relation of the parties, the distinction between the case at bar and that of the present plaintiff against the Seaboard Bank seems to be apparent. In the case of the Seaboard Bank, as has already been observed, the agency was disclosed. In the case of the defendant it was not. In the presentation of the draft for collection, the defendant represented itself to be the owner of the draft, and the payment was made by the plaintiff under those circumstances. It does not seem to need the citation of authorities to show that when money is paid upon a raised draft, without any negligence upon the part of the person paying the same, it can be recovered from the party to whom it was paid."

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The case of the Seaboard Bank above referred to is reported in 114 N. Y. 28, and relied on by appellant. In that case the indorsement to the Seaboard Bank was "for collection," whereas the indorsement here, as has been seen, was absolute. We think the fact that the further indorsement, "Paid through Chicago Clearing House to Metropolitan National Bank," may have indicated to bankers in Chicago that the latter bank cleared for the American Trust & Savings Bank, but that fact does not indicate that appellant was agent and did not own the draft. The indorsement was to be construed by the court, and the evidence of bankers as to its meaning should not be taken to change its legal import, which would be to pass the title of the draft to appellant absolutely.

The further claim is made that the court erred in not directing a verdict for appellant. A motion to that effect was made at the close of all the evidence, and counsel for appellant stated that he had "a written instruction here, the same as we presented to the court this morning." The motion was overruled, but the instruction does not appear in the abstract or the record. An instruction, in substance directing a verdict for defendant, was asked, with other instructions, for plaintiff and defendant, upon the merits of the questions submitted to the jury. The instruction to take the case from the jury, being presented with the other instructions, was waived. *Ry. Co. v. Fishman*, 169 Ill. 197; *Wright v. Avery*, 172 Ill. 313.

The first instruction given for appellee is claimed to be erroneous, in that it fails to contain two facts essential to a recovery by appellee, viz.: first, the necessity of offering to return the draft and of proving that appellee had a claim at the time of the commencement of this suit; and second, that in the collection of the draft appellant acted as agent of the American Trust & Savings Bank, and paid over the money before receiving any notice that the draft had been altered, or any demand for the repayment of the money. The instruction is, viz.:

"1. The jury are instructed that if they find, from the

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evidence, that the Flour City National Bank of Minneapolis, on or about the 7th day of February, 1894, issued its draft upon the plaintiff for the sum of \$35, payable to the order of Frank H. Harper, and delivered it to him for that sum; that afterward the said draft was fraudulently altered and raised by Frank H. Harper, or some person unknown, so that it purported to be drawn for the sum of \$3,500 instead of for the sum of \$35 only, without the knowledge or consent of the said Flour City National Bank, the drawer thereof, and that afterward the said draft so fraudulently raised and altered as aforesaid was presented to the plaintiff for certification and acceptance; and that thereupon the said plaintiff, by its duly authorized agent in that behalf, without knowledge that said draft had been changed or altered, indorsed upon said draft the following words: 'Accepted. Payable through Chicago Clearing House February 13, 1894, when properly indorsed. Merchants National Bank, by Philip P. Lee, teller;' and that the said draft was, by the said Frank H. Harper, deposited for credit in the American Trust & Savings Bank of Chicago, and that the same was by said American Trust & Savings Bank indorsed and delivered to the defendant, and that afterward said plaintiff paid to the said defendant, in the usual course of business, the full sum of \$3,500, being the amount of said draft after the same had been so fraudulently changed and raised as aforesaid, instead of the sum of \$35, being the sum for which said draft was actually drawn, without knowledge of the fact that it had been so raised and changed; and that subsequently and within a reasonable time after the discovery of the fact by the plaintiff that said draft had been fraudulently changed and altered as aforesaid from \$35 to \$3,500 (if the jury find, from the evidence, that it had been so fraudulently changed and altered), demand was made by the plaintiff on said defendant for payment of the said amount so received and collected on said draft in excess of \$35, the sum for which it was originally drawn, and that payment thereof by said defendant was refused, then the jury are instructed that

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the plaintiff has a right to recover of the defendant in this action the sum of \$3,465.

"The jury are further instructed that in case they find from the evidence the plaintiff is so entitled to recover of the said defendant the said sum of \$3,465, and if they further find from the evidence that there has been unreasonable and vexatious delay in the payment of the same, by the said defendant to the said plaintiff, they may allow interest thereon at the rate of five per cent per annum."

When appellant was requested to redeem the draft by appellee, the draft was turned over to appellant, and by it retained until it had made investigation, whereupon having refused to redeem the draft, appellant returned it to appellee, and can not be heard now, in face of these facts, to claim that appellee should again offer to return the draft. And, moreover, no tender of the draft was necessary after a formal demand was made for its payment and a refusal to pay by appellant. *Brewster v. Burnett*, 125 Mass. 68.

Whether appellee charged or credited the Flour City National Bank with the amount of the draft, was immaterial. The facts, as shown by the record outside the book-keeping of appellee, fix the rights of appellee and the Flour City Bank. When appellee accepted the draft under the circumstances shown, it became liable to pay it, and when the draft was paid and the forgery afterward discovered, appellee could rightfully charge the Flour City Bank only the amount for which the draft was originally drawn, and it could make no difference as between the Flour City National Bank and appellee whether appellee credited on its books the proper amount before or after this suit was commenced. *Brewster case, supra*.

What has been said with regard to the agency of appellant and notice to appellee of such agency, disposes of the remaining contention as to this instruction. Under the evidence so far as concerns the alleged agency, the court might well have instructed a verdict for appellee instead of submitting the matter to the jury. We see no error in the instruction. The same contention is made by appellant as

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to instructions two and three given for appellee. It is unnecessary to set them out. We think there was no error in giving them. The court also refused twenty-four other instructions asked by appellant, and gave for appellee instructions numbered four, six and seven, of which complaint is made, but in what respect there was error in refusing or giving any of these numerous instructions, counsel have not attempted by their brief to point out, and we do not feel called upon to consider them further than to say we have examined the instructions given for appellee and appellant, and being of opinion that the jury was fully instructed on the questions at issue, and that the record presents no reversible error, the judgment will be affirmed.

John C. McKeon, Receiver, etc., et al., v. Harris Wolf.

77	325
178	85
77	325
197	160

1. **COMMODITY—*The Term Defined.***—The primary meaning of the word commodity, according to the lexicographers, is convenience, and its secondary meaning is that which affords convenience or advantage, especially in commerce, including everything movable which is bought and sold.

2. **SAME—*Bonds Are, etc.***—The bonds of the Chicago Auditorium Association are a commodity within the meaning of Sec. 130 of the Criminal Code of this State, etc. The word commodity in ordinary interpretation, includes marketable bonds.

3. **STATUTES—*Rule of Construction.***—In the construction of statutes where general words follow an enumeration of particular cases, such general words are held to apply to cases of the same kind as those which are expressly mentioned, and are not allowed a broader or more general interpretation.

4. **SAME—*Exception to the Rule.***—"But this rule does not apply when the particular precedent words exhaust a whole *genus*; in which case the general term is held to refer to a larger class."

5. **GAMBLING CONTRACTS—*Construction of Sec. 130 of the Criminal Code.***—The intent of the legislature in enacting Sec. 130 of the Criminal Code was, not merely to protect grain, stocks and gold against dealings of a certain kind, but to prevent a known evil, viz., dealing in options, as well in other things as in grain, stocks and gold.

6. **SAME—*Optional Sale of Bonds.***—An agreement by the seller of certain bonds to buy them back at a future time and at the same price

should the purchaser desire to sell them, is an optional contract, and by force of Sec. 130 of the Criminal Code is void. (Hurd's Statutes 1898, p. 571.)

Assumpsit.—Common counts. Trial in the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Finding and judgment for plaintiff. Error by defendant. Heard in this court at the March term, 1898. Reversed. Opinion filed June 29, 1898.

STATEMENT.

Plaintiff in error, the National Bank of Illinois, at Chicago, sold to defendant in error certain bonds, known as the bonds of the Chicago Auditorium Association, and at the time of the several sales, entered into the following agreements and undertakings with defendant in error:

“CHICAGO, June 22, 1896.

H. WOLF, Esq., City.

DEAR SIR: We have this day sold to you eleven thousand dollars of the five per cent bonds of the Chicago Auditorium Association at par and interest.

Should you desire to resell these to us during the month of January, 1897, we will buy them back from you at the same price.

Yours truly,

(Signed)

WM. A. HAMMOND,

Second Vice-Prest.”

On July 9, 1896, in connection with the sale of others of the bonds:

“Should you wish to sell these bonds back to us in the month of January, 1897, we will buy them back at par and interest.

W. A. HAMMOND,

Second Vice-Prest.”

On July 14, 1896, referring to sale of others of the bonds:

“Should you wish to sell us these bonds back during the month of January, 1897, we will purchase them at par and interest.

(Signed)

W. A. HAMMOND.”

And on July 15, 1896, referring to another of the sales:

“If you wish to sell these bonds back to us at par and

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interest during the month of Janaury, 1897, we will repurchase them from you at the above price.

(Signed) W. A. HAMMOND,
Second Vice-Prest."

Plaintiff in error McKeon was appointed receiver of the bank on December 21, 1896. On January 16, 1897, defendant in error gave the following notice to the receiver:

"CHICAGO, ILLINOIS, Jan. 16, 1897.

HON. JOHN C. McKEON, Receiver National Bank of Illinois.

I hereby tender you thirty-five bonds of the Chicago Auditorium Association, of one thousand dollars each, making a total of thirty-five thousand dollars, and I hereby offer to sell said bonds to you, as said receiver, at their face value with accrued interest.

This tender and this offer to sell are made in pursuance of certain receipts and guarantees given me by said National Bank of Illinois, at the time I purchased said bonds from said bank.

Copies of said receipts and said guarantees are attached hereto and made a part hereof, and your attention is specifically called thereto.

You are further notified that if said bonds are not repurchased by you in pursuance of above demand, I shall at once place them upon the open market, offering them for sale, and shall hold said bank and you, as receiver thereof, liable for any loss incurred by me growing out of said sale, or I shall have said bonds appraised and their present market value fixed, and hold you, as receiver of said bank, and said bank liable for any difference between the face value and said appraised value.

(Signed) H. WOLF."

The receiver refused to accept the bonds or to recognize any obligation by reason of the agreements to repurchase.

This suit was brought to recover damages for breach of these several agreements by the bank to repurchase the bonds at the option of defendant in error. A jury was waived, and the cause was submitted to the trial court upon an agreed statement of facts. Among other items in the agreed statement is the following:

"13. * * * That said Auditorium bonds were not speculative bonds, but were and are in the banking community of Chicago recognized as good and valid staple securities, either for a loan of money or for the purchase and sale thereof," etc.

"14. It is agreed that in the making of this stipulation, by the parties hereto, the power of the National Bank of Illinois, and that of William A. Hammond, its second vice-president, to enter into said contracts in its behalf, is affirmed on the part of the plaintiff herein, and is disputed on the part of the defendants herein, and the judgment of the court is requested on the stipulated facts."

The trial court found the issues for defendant in error and against plaintiff in error, the National Bank of Illinois, but in favor of plaintiff in error, the receiver, and assessed damages at \$35,257.61, and entered judgment for that amount against the bank. To reverse that judgment this writ of error is prosecuted.

GEORGE M. ECKELS, attorney for plaintiffs in error.

Either Wolf, by contract and for a valuable consideration, reserved to himself an option to sell to the National Bank of Illinois, at Chicago, during the month of January, 1897, \$35,000 worth of bonds of the Auditorium Association, in which case the contracts would be void, as in violation of section 130 of the criminal act of Illinois, making all contracts for options for the sale of commodities void—Sec. 130 Criminal Code Ill. (2d Edn. Starr & Curtis, 253); *Schneider v. Turner*, 130 Ill. 28; S. C., 27 Ill. App. 220; *Locke v. Towler*, 41 Ill. App. 66; *Corcoran v. Lehigh & Franklin Coal Co.*, 37 Ill. App. 577; S. C., 138 Ill. 398; *Kerting v. Hilton*, 51 Ill. App. 437; *Campion v. Smith*, 46 Ill. App. 501; *Peterson v. Currier*, 62 Ill. App. 163; S. C., 163 Ill. 528; *Wolsey v. Neeley*, 62 Ill. App. 141; *State v. Williams*, 2 Strob. 474; Sec. 88 Criminal Code Ill., Starr & Curtis, 2d Ed.; Constitution Ill., Art. 13; Railroad and Warehouse Act Ill., Sec. 177 (Starr & Curtis 2d Ed.); *Sutherland on Stat. Constr.*, Secs. 278, 279; *Am. & Eng. Ency. Law*, 23,

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443; *Ellis v. Murray*, 28 Miss. 142; *Foster v. Blount*, 18 Ala. 687; *State v. Holman*, 3 McCord, 306; *Woodworth v. State*, 26 Ohio St. 196; *Webber v. City*, 148 Ill. 319; *Eubanks v. State*, 5 Mo. 450; *Shropshire v. Glasscock*, 4 Mo. 536—or the memoranda were mere offers made without consideration, whereby the bank offered to buy during the month of January, 1897, said bonds, in which case, the bank having been placed in the hands of a receiver, and the receiver having repudiated the offers upon his appointment and prior to his acceptance, the offer was of no binding force or effect. Sec. 228 Rev. Stats. U. S.; *White v. Knox*, 111 U. S. 784; *Pomeroy, Spec. Perf.*, Sec. 60; *School Directors v. Trefethren*, 10 Ill. App. 127.

It is a well known principle of insolvency law that an assignee or receiver has a right to elect whether he will adopt or reject an executory contract of the debtor, and that he has a reasonable time within which to make his election, providing a right of action had not accrued prior to the assignment, or the appointment of a receiver. *U. S. Trust Co. v. Wabash W. Ry.*, 150 U. S. 287; Sec. 328 *Anderson's Beach on Receivers*; *Quincy Ry. Co. v. Humphreys*, 145 U. S. 82.

It is also a well known principle of insolvency law that a claim for damages under a right which was not in existence at the time of the assignment can not be proved against the assigned fund. *Fidelity Safe Dep. & Tr. Co. v. Armstrong*, 35 Fed. 567; *Riggin v. Magwire*, 15 Wall. 549; *French v. Morse*, 2 Gray, 111.

MOSES, ROSENTHAL & KENNEDY, attorneys for defendant in error, contended that bonds of incorporated companies, like the Chicago Auditorium Association, are not within the mischief of the Criminal Code, and they are certainly not within its letter. Section 130 of the Criminal Code (being the one in question) reads as follows :

“Whoever contracts to have or give to himself, or another, the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold,

* * * shall be fined not less than ten dollars nor more than one thousand dollars, or confined in the county jail not exceeding one year, or both, and all contracts made in violation of this section shall be considered gambling contracts and shall be void."

In considering this statute we must not forget that we are dealing with a criminal and highly penal statute, which will be strictly construed, and is not subject to enlargement or loose construction.

It is true that this statute first received interpretation by the Supreme Court in *Schneider v. Turner*, 130 Ill. 28, which case is printed at length in the opposing brief.

The contract in the *Schneider* case, however, was held to be a pure option, a dealing with the stock of the North Chicago City Railway, which was one of the specially enumerated things mentioned in the statute as "stock of any railroad or other company." The opposing brief does not attempt to discuss whether or not the bonds of an incorporated company, bearing interest payable semi-annually, and which are denominated "a good, valid and staple security" in the stipulation, are within the mischief of the statute.

A highly penal statute in derogation of the common law must be strictly construed, and can not be held to extend to bonds of corporations like that of the Auditorium Association, unless bonds were in fact mentioned in the act. If the words "or other commodity" would follow the words "stock of any railroad or other company, or gold," then there might be an apparent warrant for an argument that bonds might be included, and even in that case it would leave it doubtful whether it would not simply include bonds of railroad companies, which sometimes are traded in the stock exchange; but in this case we are dealing with the bonds of a local private corporation owning a building for hotel and exhibition purposes. *Sutherland on Statutory Construction*, Sec. 349; *Hankins v. The People*, 106 Ill. 628; *Thompson v. Weller*, 85 Ill. 197; *Cadwallader v. Harris*, 76 Ill. 372; *Canadian Bank v. McCrea*, 106 Ill. 289.

It has been said, and properly, that the fittest course in all cases where the intention of the legislature is in question, as at bar, is to adhere to the words of the statute, construing them according to their nature and import, in the order in which they stand in the act, rather than to enter upon an inquiry as to the supposed intention of that body. *Frye v. C., B. & Q. R. R.*, 73 Ill. 399; *Beardstown v. Virginia*, 76 Ill. 34.

The word "commodity," standing by itself, may, and likely does, mean "merchandise;" but when connected with grain, it must mean the products of the earth when severed and put in manufacture. It will likely include flour, barley, oats, potatoes, fruits, groceries, manufactured goods, and possibly meats, etc.; but it never was used to include a promissory note, bill of exchange, chose in action, mortgage, trust deed, or real estate. The broad definition found by Judge Waterman in Webster's and the Century Dictionaries is not applicable to the case under consideration.

In *Citizens Bank v. Steamboat Co.*, 2 Story, 16, 5 Fed. Cases, pp. 719, 731-732, Judge Story said:

"A bond, an annuity, a legacy, a debt due on account, may be bought and sold; but no one would assert any of these things to be merchandise. * * * The term 'merchandise' is usually applied to specific articles, having a sensible, intrinsic value, bulk, weight, or measure in themselves; and not merely evidences of value, such as notes, bills of exchange, checks, policies of insurance and bills of lading. * * * The term 'merchandise' is never applied to choses in action."

MR. JUSTICE SEARS delivered the opinion of the court.

Plaintiffs in error contend that the agreements upon which the recovery here is founded are within the application of Section 130, Chapter 38 of the Revised Statutes, and hence are void.

Defendant in error contends, first, that the objection to a recovery upon this ground was not contemplated in the submission of issues to the trial court upon the agreed

statement of facts, and hence can not be urged here; and, secondly, that the agreements are not in violation of the statute invoked.

We are of opinion that the stipulation of submission is broad enough to permit plaintiffs in error to avail of any defense which may arise from the provisions of the statute. Item fourteen of the agreed statement of facts provides: "The power of the National Bank of Illinois, and that of William A. Hammond, its second vice-president, to enter into said contracts in its behalf, is affirmed on the part of the plaintiff herein and is disputed on the part of the defendants herein," etc. It is difficult to perceive why that "power" of this corporation to enter into the contracts in question may not as well be disputed upon the ground that the contracts are declared gambling contracts within the inhibition of the Criminal Code, as upon any other ground.

It is apparent from the record that the plaintiffs in error relied upon this contention in the court below. The following, among other propositions of law, was tendered by them to the trial court:

"1. The contracts sued on are gambling contracts within the meaning of the Criminal Statute of the State of Illinois, commonly known as Section 130 of the Criminal Code, and are void."

It was clearly upon the stipulated facts that the judgment of the court was sought. We proceed, then, to consider the question, the determination of which is decisive of the cause, viz.: Whether the agreements sued upon are such as to come within the prohibition of the statute.

That the writings here constitute merely an option, as contemplated by the word "option" in the statute, can hardly be questioned. *Schneider v. Turner*, 130 Ill. 28.

In this case Mr. Justice Wilkin, delivering the opinion of the court, said: "It is insisted that by the prohibition of the statute, the legislature only intended to make unlawful such option contracts as contemplate a settlement by differences; that to come within the inhibition of section 130, the contract must be a gambling contract. * * * The

first question which suggests itself in considering the construction of this statute contended for by appellants is, if their construction is the true one, why was the statute enacted at all? Nothing is more clearly and firmly established by the common law, than that all gambling contracts are void. It is equally well settled that all contracts for the purchase and sale of property, with the understanding or agreement of the parties (whether that agreement is expressed on the face of the contract, or exists by secret understanding) that the property is not to be delivered or accepted, but the contract satisfied by an adjustment of the differences between the contract and market prices, are mere wagers or gambling contracts, and void. * * * It must be presumed that the object of the legislature was to declare that unlawful which theretofore had been lawful. Prior to this act it was lawful to contract to have or give an option to sell or buy, at a future time, grain or other commodity. Such contracts were neither void nor voidable at common law. The statute makes this unlawful and void in Illinois."

Counsel urge that the bonds, which are here the subject-matter of the agreements, are not within the definition of those things as to which dealing in options is prohibited. In other words, it is argued that the expression "or other commodity," can not be interpreted to include bonds. And to sustain this contention the rule of *ejusdem generis* is invoked. We have, then, to determine, first, whether in its ordinary acceptation the word "commodity" would include marketable bonds; and, secondly, if so, whether such ordinary acceptation of the word is to be here limited by the application of the rule of construction known as *ejusdem generis*. The primary meaning of the word commodity, according to the lexicographers, is convenience, and its secondary meaning is "that which affords convenience or advantage, especially in commerce, including everything movable which is bought and sold."—Webster. "An article of trade or commerce, a movable article of value, something that is bought and sold."—Standard Dictionary.

"Commerce, privilege, profit, gain, property, goods, wares, merchandise."—Anderson's Law Dictionary. "Anything movable that is subject of trade or acquisition."—Century Dictionary.

Under a constitutional provision authorizing the legislature to impose duties and excises upon "any produce, goods, wares, merchandise and commodities whatsoever," the Supreme Court of Massachusetts held that the franchise of a corporation came within the definition of commodity, saying: "Commodity is a general term, and includes the privilege and convenience of transacting a particular business." *Commonwealth v. Lancaster Sav. Bank*, 123 Mass. 493.

The Supreme Court of the United States, commenting upon this provision of the Massachusetts constitution, said in relation to the word "commodities": "If regarded as meaning goods and wares only, there would be much difficulty in the case; but if it signifies 'convenience, privilege, profit and gains,' as uniformly held by the State court, then all difficulty vanishes and the case is clear." *Hamilton Co. v. Massachusetts*, 6 Wall. 632.

The court did not, however, pass upon the definition of the word, except to adopt the definition of the State court, and that merely because the State court had so decided.

This court has had occasion heretofore to pass upon the meaning of this word in the statute in question, and as applied to a like question, viz., its application to bonds. *Peterson v. Currier*, 62 Ill. App. 163.

In that case Mr. Justice Waterman, delivering the opinion of the court, said: "The statute of this State, Sec. 1, Chap. 131, directs that in the construction of all general statutes, provisions, terms, phrases and expressions shall be liberally construed, in order that the true intent and meaning of the legislature may be carried out, unless such construction would be inconsistent with the manifest intent of the legislature," etc., and concluded, "we are therefore of the opinion that bonds are a commodity within the meaning of Sec. 130 of the Criminal Code of this State," etc.

We are of opinion that the word commodity would, in ordinary interpretation, include marketable bonds.

It remains, therefore, to inquire whether such ordinary interpretation of the word is to be here limited by context and application of the rule *ejusdem generis*. The rule invoked is that in the construction of statutes where general words follow an enumeration of particular cases, such general words are held to apply to cases of the same kind as those which are expressly mentioned, and are not allowed a broader or more general interpretation. Potter's Dwaris, 247; Broom's Legal Maxims, 650-651; Sutherland on Statutory Construction, Sec. 270; In re Swigert, 119 Ill. 83; Wilson v. Board of Trustees, 133 Id. 443; Ambler v. Whipple, 139 Id. 311; Moore v. People, 146 Id. 600; Gillock v. People, 171 Id. 307; City of Cairo v. Coleman, 53 Ill. App. 680.

Sutherland announces the rule as follows: "The object of enumeration is to set forth, in detail, things which are in themselves so distinct that they can not conveniently be comprehended under one or more general terms; there is believed to be no *a priori* presumption that the things enumerated are all of them of the same kind. When a specific enumeration concludes with a general term, it is held to be limited to things of the same kind. It is restricted to the same *genus* as the things enumerated."

Looking to the reason as well as the letter of the rule, it seems clear that the occasion for its application arises only when the precedent word is descriptive of some particular object or objects belonging to a class or *genus*. It is only by the use of such a special word that the general words following can be limited to such other objects as belong to the same class or *genus* with the precedent special word. If the precedent word is itself generic, descriptive of a class or *genus*, and inclusive of all that belong to the class or *genus*, the general word following must either include something outside of that *genus* or class, or else mean nothing at all. In such case the rule of *ejusdem generis* does not apply. 23 Am. & Eng. Ency. 442; Sutherland on

Statutory Construction, Secs. 278-279; *United States v. Fisher*, 2 Cranch, 358; *Foster v. Blount*, 18 Ala. 687; *State v. Holman*, 3 McCord, 306; *Woodworth v. The State*, 26 Ohio St. 196; *Eubanks v. The State*, 5 Mo. 450; *Ellis v. Murray*, 28 Miss. 142; *Webber v. City*, 148 Ill. 319; *Gillock v. People*, 171 Id. 307.

It is announced in the Am. & Eng. Ency. as follows:

"Nor does it apply when the particular words exhaust a whole *genus*; in that case the general term is held to refer to a larger class."

And by Sutherland as follows:

"If the particular words exhaust a whole *genus*, the general words must be held to refer to some larger *genus*."

In *Ellis v. Murray*, *supra*, the court said: "* * * When all those of the inferior degree are embraced by the express words used and there are still general words used they must be applied to things of a higher degree than those enumerated; for otherwise there would be nothing for the general words to operate upon and effect could not be given to all of the words."

Nor is the rule *eiusdem generis* ever to be permitted to limit or control the intent of the legislature when that intent can be clearly ascertained. Sutherland says: "This rule can be used only as an aid in ascertaining the legislative intent, and not for the purpose of controlling the intention or of confining the operation of a statute within narrower limits than was intended by the lawmaker. It affords a mere suggestion to the judicial mind that where it clearly appears that the lawmaker was thinking of a particular class of persons or objects, his words of more general description may not have been intended to embrace any other than those within the class. The suggestion is one of common sense. Other rules of construction are equally potent, especially the primary rule which suggests that the intent of the legislature is to be found in the ordinary meaning of the words of the statute. * * * Hence, though a general term follows specific words, it will not be restricted by them when the object of the act and the inten-

tion is that the general word shall be understood in its ordinary sense."

In *Webber v. City*, *supra*, the Supreme Court had occasion to interpret an ordinance which specified: "Circuses, menageries, caravans, side shows and concerts, minstrel or musical entertainments given under a covering of canvass, exhibitions of monsters or of freaks of nature, variety and minstrel shows, athletic, ball or similar games of sport, and all other exhibitions, performances and entertainments not here enumerated, given in a building, hall or under canvass or other cover, or within any inclosure."

Holding that horse races were included in the general description, the court said:

"That the operation of this general and sweeping clause is not to be restricted by an application of the maxim *cjusdem generis* is, we think, very obvious. To apply that maxim would defeat the wider intent already expressed, and would do violence to the language of the clause itself. The words used, if given their natural and obvious import, apply not to the other exhibitions, performances and entertainments of the same *genus* with those previously specified, but to all other exhibitions, performances and entertainments not there enumerated, given within any inclosure," etc.

In *Gillock v. The People*, *supra*, the statute to be construed was as follows:

"Whoever willfully * * * enters into any dwelling house, kitchen, office, shop, storehouse, warehouse, malt-house, stillinghouse, mill, pottery, factory, wharfboat, steamboat or other water craft, freight or passenger railroad car, church, meetinghouse, schoolhouse, or other building, with intent to commit murder, robbery, rape, mayhem or other felony or larceny, shall be deemed guilty of burglary." And the court said: "To limit the meaning of the words 'other building,' as used in our statute, to buildings *cjusdem generis* with those specifically named, would be to render the general words practically meaningless. What building not a dwellinghouse, legally speaking, is of the

same kind as a dwellinghouse? And so with each of the buildings mentioned. * * * The purpose of the legislature in passing the foregoing section of our statute was to radically change the common law as to the crime of burglary, and make those who burglariously enter other buildings than a mansion or dwellinghouse, guilty of that crime, and we think the intention to include buildings not *ejusdem generis* with those mentioned by name is clearly shown by the use of the words 'other building.'"

We think it clear that the intent of the legislature here was, not merely to protect grain, stocks and gold against dealings of a certain kind, but to prevent a known evil, viz., dealing in options as well in other things, as in grain, stocks and gold. In *Pope v. Hanke*, 155 Ill. 617, Mr. Justice Magruder, in delivering the opinion of the court, said: "We have held that dealing in futures or options is productive of mischievous results, and have characterized it as a 'dangerous evil' and 'a vice that has in recent years grown to enormous proportions.'"

It is argued that the use of the words "stock of any railroad or other company, or gold," following the general term "other commodity," indicates that it was not the intent of the legislature to give the word "commodity" its ordinary and general meaning, as, it is argued, in that event the subsequent specific enumeration of stocks and gold would have been unnecessary and meaningless. Whatever may have been the motive of the legislature in referring specially to stocks and gold, whether through excessive caution lest stocks, when shown to be commercially valueless and not marketable, or gold, when in the form of money, might be held not to be commodities, or from mere unnecessary repetition by way of emphasis of two things which have been commonly used in dealing in differences, actual or fictitious, or from other motive, we are, in any event, not willing to hold that this subsequent special reference shall operate to make the general term "other commodity" absolutely meaningless.

If the rule were applied as contended for by counsel for

appellant, it is difficult to perceive how the words "other commodity" could have any application whatever. They could not, if restricted to things *ejusdem generis* with grain, include coal, as held in *Corcoran v. Lehigh & F. Coal Co.*, 37 Ill. App. 577, affirmed in 138 Ill. 390. Nor could they include lard or pork, as held in *Pearce v. Foot*, 113 Ill. 228. Nor a manufacturing plant, as held in *Kerting v. Hilton*, 51 Ill. App. 437. Yet each of these things was held, in one of the several cases, to have been within the operation of this statute, and of necessity within the meaning of the term "other commodity."

While the Supreme Court has not had occasion to pass upon the precise question here presented, yet that court has evidently given the word in question its ordinary and generally accepted meaning. In *Schneider v. Turner*, *supra*, the court said: "It is the contract for such choice, right or privilege of selling or buying, at a future time, any commodity, the statute was intended to prohibit."

We are of opinion that marketable bonds are within the prohibition of the statute, and that the contracts here in question are, by force of the statute, void.

To the other contentions of plaintiffs in error, we can not assent. It is, however, unnecessary to consider them in detail, as the determination reached disposes of the cause.

The judgment is reversed.

Mr. Justice WINDES dissents.

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1. **INSOLVENCY—Sufficient Allegations of.**—Where a bill avers in positive terms, and as of the complainant's own knowledge, that the defendant's only property is its leasehold interest in a building, and that such interest is mortgaged for an amount greatly in excess of its value, it is a sufficient allegation of insolvency.

2. **EQUITY PRACTICE—Interlocutory Injunctions.**—An interlocutory

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injunction is a mode by which a court preserves property in dispute, with the least injury to all parties, until it can finally determine the respective rights of the parties claiming it.

8. *INTERLOCUTORY INJUNCTIONS—Granting of.*—When the rights of the parties are doubtful, the court will, on an application for an interlocutory injunction, consider the comparative injury which will result from a granting or withholding of it, as well as the justice of the case, as it appears on the evidence.

4. *SAME—When Granted Without Notice.*—When the mere act of giving notice may be productive of the mischief apprehended by inducing the defendant to accelerate the act, in order that it may be completed before the time for making the application arrives, the court will award an injunction without notice.

5. *SAME—Verification of the Bill.*—An affidavit of the complainant in a chancery proceeding, which states that he has read the bill of complaint and knows the contents thereof, and that the matters and things therein stated are true of his own knowledge, except those allegations in said bill made upon information and belief, and as to all such matters he believes them to be true, is not sufficient.

Bill for an Injunction.—Appeal from the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in this court at the March term, 1898. Order granting an injunction reversed. Opinion filed May 16, 1898.

NEWMAN, NORTHEUP & LEVINSON, attorneys for appellant.

SHOPE, MATHIS, BARRETT & ROGERS, attorneys for appellee.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from an interlocutory order in chancery, granting a temporary injunction on a bill filed by appellee against appellant for a reformation of a contract, an accounting and a temporary injunction, as ancillary to the relief prayed. June 11, 1897, by written instrument of that date, the Chicago Exhibition Company leased to the State Board of Agriculture the right to occupy and use for twelve days, commencing November 2, 1897, and ending November 13, 1897, the ground floor and gallery spaces of the Coliseum, situated in the city of Chicago, for the holding of a fat stock, horse, agricultural, horticultural, floricultural, pet

and poultry show. The lease contains the following provisions:

“That said lessor shall receive, in lieu of rent, thirty per cent (30 %) of the entire gross receipts from all sources of income to the parties hereto from said show, as herein outlined, to be held by said lessee, and the said lessee is to receive seventy per cent (70 %) of said receipts.

“During the time when the said Coliseum is occupied and used under the terms of this agreement, the lessor shall provide and furnish at its cost said Coliseum with light (except light for concessionaires' exhibits and booths and special displays), heat, an amphitheatre for seating about seven thousand people, and an arena about three hundred by one hundred feet (300' x 100') protected on the sides with a closed railing; also janitor service (excepting stock attendants), and cause to be thoroughly swept and cleaned all parts of said Coliseum which shall be occupied and used under the terms of this agreement, excepting stalls and pens actually occupied by animals; also necessary water, ushers and ticket sellers, excepting ticket takers, same to be furnished and paid for by the lessee; necessary police; and also furnish and erect four hundred (400) stalls, which said four hundred stalls shall be the property of the lessor, and two hundred (200) more stalls, the latter to be erected with material to be furnished by the said lessee, which shall be the property of the lessee.

“The said lessee covenants and agrees to offer fifteen thousand dollars (\$15,000) in premiums and expend not less than three thousand dollars (\$3,000) in advertising, and to pay for all other incidental expenses not provided for above, which may be incurred in properly organizing and holding said show.

“Inasmuch as the lessor is under annual contract for certain concessions, the lessee agrees to confer with the lessor and obtain its approval before making contracts with concessionaires or renting floor space to same, and also agrees to permit the lessor to solicit concessionaires for floor space equal to one hundred by fifty feet (100' x 50'), provided the

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lessor obtains the written approval of the lessee before closing contract with any concessionaire; it being understood that the proceeds from such concessionaires are to be considered part of the gross receipts above mentioned.

"A statement in writing showing the amount of the gross receipts from admissions of spectators and from other sources shall be prepared immediately after said show, and the owners of the land upon which said Coliseum is located shall have the right, if they so desire, to be represented at the counting and checking of said receipts, and the lessee or its duly authorized representative shall have the right to be present at the gates and at the counting and checking of such receipts. The lessor and lessee agree that they will keep a full and true account of all receipts of said show and that said account shall be open for inspection by the parties hereto and by the owners of the land, through their agents, at any time during business hours, and full payment of rental and receipts from concessions shall be made daily, if so requested by either party hereto."

It was further provided by the lease, that in the event that appellee should not hold the show, it would pay \$500 per day for the number of days specified.

Another agreement was executed by and between the parties in September, 1897—on what day in September does not appear from the agreement, but is alleged by the bill to have been the 10th—which agreement is follows:

"Whereas, the Chicago Exhibition Company entered into a contract with the Illinois State Board of Agriculture, dated June 11, A. D. 1897; and

"Whereas, said contract provides that the said Chicago Exhibition Company shall provide certain seating capacity and erect certain stalls as specified in said contract; and

"Whereas, the said Illinois State Board of Agriculture has materially enlarged the plan and scope of the fat stock, horse show and agricultural and horticultural exhibition to be held in the Coliseum building under the terms of said contract; and

"Whereas, the said Illinois State Board of Agriculture

requires on account of said enlargement of the plan and scope of said exhibition a radical change and increase in said work to properly prepare for said exhibition.

“ Now, therefore, it is agreed by and between the parties hereto as follows, to wit :

“ That for and in consideration of the payment of the sum of thirty-eight hundred and fifty dollars (\$3,850), to be deducted from that portion of the gross receipts of the said exhibition to which the said State Board of Agriculture shall be entitled under the original contract of June 11, 1897, the said Chicago Exhibition Company, in lieu of the work required under said original contract, hereby agrees to do all the work required and to furnish the material necessary for the arrangement of the Coliseum building in accordance with the plans marked A1 and A2, together with the specifications accompanying the same, the said plans and specifications being made a part of this supplemental agreement, with the following modifications: iron shoes to be omitted; the new boxes to have brass rails in front and wooden rails for the remainder; lumber to be white pine or Norway pine instead of yellow pine; old lumber to be used where practicable; the face of box stalls only to have wire guards, and only divisions of partitions of single stalls for horses to have wire guards; undressed lumber to be used for stalls except for faces of box stalls and for all the posts of stalls; posts to be of pine instead of oak; and the lessor to own all material of every kind after the close of the exhibition.

“ It is hereby further agreed by and between the parties hereto that the time for holding said exhibition is hereby shortened to one week instead of twelve days, and the lessor hereby relieves the lessee from the payment of the five hundred dollars (\$500) for each day over the one week as called for in the sixth paragraph of the eighth section of the original contract.

“ This agreement shall bind the parties hereto, their successors and assigns,” etc. .

The specifications above referred to contain the following :

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"The contractor undertaking the work is to furnish all material necessary and labor required for the erection of 450 single stalls and 175 box stalls. The State Board of Agriculture will furnish the material for all the stalls, excepting for 400 of those first mentioned. The 450 stalls to be constructed in accordance with the details on the plan shown as 'Plan A2,' and arrangement of the stalls and the building to be as shown on 'Plan A1.' The entire space upon which stalls are located, being about 300 x 300 feet, to be covered with two inch plank, and upon this plank floor stalls and other work are to be erected."

After specifying material to be used, measurements, and such details as are usual in specifications for construction, the specifications conclude as follows:

"It is distinctly understood and agreed by and between the parties hereto that the thirty per cent of the gross receipts to which the lessor is entitled under the terms of the original contract of June 11, 1897, shall exclude any share in the receipts for advertisements, State appropriation, guaranty fund, or donations made to the lessee for holding the said horse, fat stock, dairy, poultry and agricultural show in the Coliseum building, November, 1897."

Both contract and specifications purport to be signed by the parties.

The bill, referring to the agreement of September, 1897, alleges as follows:

"Your orator, further complaining, respectfully shows unto your honor, that at the time of the making of said supplemental agreement both the officers and members of your orator's said board, and the officers and directors of the said Chicago Exhibition Company well knew the capacity of the said Coliseum building, and the stalls and other structures that could and might be built and placed therein, outside of the space occupied by the arena and seats for exhibition in the ring, or arena, and outside of the various entry ways, etc., reserved in the said original contract, and that each thereof well knew and understood that with the plans of the enlarged exhibition to be given by your orator the

whole of such space might be required to be filled with stalls, pens and appurtenances for the proper housing, caring for and exhibition of the horses, cattle, sheep, poultry, and agricultural, horticultural and floricultural exhibits that were likely to be present and exhibited at said show and exhibition; and that each of said parties and the respective officers and members of the board of your orator executed said supplemental contract in view of such conditions, and in contemplation of the increased and extended character of the show and exhibition, and well understood that the whole of the space not occupied by the auditorium and arena, and said reservations, might be required to be built up and filled with such stalls, pens and appurtenances as might be necessary to make said exhibition complete and to accommodate exhibitors at said show. And that it was, at the time of the making of said supplemental agreement, expressly agreed and understood by your orator's said officers and members of its board, and by the said Chicago Exhibition Company, its officers and directors, that the said supplemental agreement was intended to take the place of so much of said original agreement of June 11, 1897, as provided the manner of dividing said extra space, and of the number and character of the stalls and appurtenances therein built and made, and to take the place of so much of said original contract as required your orator to furnish lumber for any or either of the stalls or appurtenances to be therein built. *And it was expressly agreed and understood by the parties, and it was so intended to be expressed in said contract, that the said Chicago Exhibition Company was to furnish all the material and do all the work necessary to provide all of such stalls, pens and appurtenances and places of exhibition within said Coliseum building as might be required to fully and perfectly accommodate the said exhibition and exhibitors, as might be required, and thereafter directed to be made and placed therein by the officers and agents of your orator.* And it was further also expressly understood that the reference in said supplemental contract to the said Plans A1 and A2, and the specifications accom-

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panying the same referred only to the manner of making what is known in the original contract as the arena, box seats and the promenades and seatings; and in respect of stalls and other appurtenances for caring for the stock that might be entered for exhibition, such reference was only intended and understood by the parties to refer to so much of said plans and specifications as stated in what manner the work was to be done, and did not, and was not so understood by the parties, refer to the number of stalls and pens or the character of appurtenances to be built in said Coliseum building, or to the arrangement thereof in said building, as shown upon said plans, but on the contrary, *it was expressly agreed and understood that the said Chicago Exposition Company was to build all such stalls, pens and appurtenances for the keeping and exhibition of horses, cattle, sheep, hogs, poultry and horticultural, agricultural and floricultural exhibits as might be entered at or be attendant upon said exhibition, so as to be held by your orator in said building, and to furnish all material therefor, in consideration of the said sum so agreed to be paid out of the seventy per cent of the gross income from said show coming to your orator.*"

It will be observed from the italicized parts of the foregoing quotation from the bill, that it is alleged in positive terms that it was understood and agreed by the parties as therein stated; in other words, that the actual contract between the parties was as therein stated. The bill then alleges that it was the intention of the parties that by the supplemental agreement the first clause of the specifications above quoted, commencing with the words, "The contractor undertaking this work," and ending with the words, "are to be erected," should be abrogated, and that, by mistake and inadvertence, that clause was not excepted from the contract. The bill then proceeds as follows: "Your orator avers the fact to be that the contract between your orator and the said Exhibition Company was, as aforesaid, that the number of stalls and their location and their kind, whether single or double, and the nature and character of the pens

and other appliances and appurtenances to be put in said building, to be used by your orator and the exhibitors of said show, during the continuance thereof, was to be of such number, occupy such space and be of such kind as your orator, by its agents and officers, might thereafter direct, and to be built when ordered by your orator or its said officers or agents, according to such portion of said specifications as related to the details of construction of the stalls, pens and appurtenances.”

We are of opinion that the allegations of the bill to the effect that the actual contract between the parties was materially different from what it purports to have been by the writing of September, 1897, and the specifications therein referred to are sufficient, if clearly and satisfactorily proved, to entitle the complainant to a reformation of the written agreement in accordance with the actual agreement between the parties. That a court of equity has jurisdiction to reform such a contract is not controverted.

In a subsequent part of the bill, and following the allegations above referred to, it is alleged that complainant was the owner, prior to the execution of the agreement of June 11, 1897, of about 200 or 225 knocked down stalls, the material of which was referred to in that contract as the material to be furnished by complainant for the erection of 200 stalls, and that, at the time of making the supplemental agreement, it was agreed between the parties that the Exhibition Company might use that material, so far as the same could be used, in building stalls and fitting up the space outside the arena and auditorium and reserved spaces with stalls; but that after the supplemental agreement was made and before the said material came to the possession of the Exhibition Company, it was destroyed by fire, and afterward complainant instructed the Exhibition Company to supply the lumber and offered to pay for the same, which complainant alleges it was not bound to do. Appellant's counsel contend that this agreement in reference to the old material is inconsistent with appellee's claim that appellant, by its contract, was bound to furnish all the material for

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the stalls. We do not think it necessarily inconsistent with such claim that appellee, for whose use all the stalls were to be erected, should agree to permit appellant to use, in the erection of stalls, old material which had theretofore been used for stalls; or that when such material was burned appellee should agree that a like quantity of lumber should be substituted for it, at appellee's expense, on the understanding alleged by appellee, that the lumber, after being so used, should belong to it. Whatever effect these circumstances may have, in connection with other evidence, on the final hearing, we do not think them sufficient to overturn the *prima facie* case for a reformation of the contract stated in the bill.

The bill avers, as of complainant's own knowledge, that the tickets to the show, including 111 box tickets, were delivered to the appellant for sale, and were sold and disposed of by appellant in large quantities and for a large amount; that appellant has reported to appellee that it, appellant, had collected from the sale of tickets the sum of \$47,091.25; and that appellant, itself, took two of the boxes at the season rental of \$100 each, and has reported to appellee that it is chargeable for said boxes; and that appellant placed the box tickets which were delivered to it for sale in the hands of John A. Logan, Jr., for sale and disposition.

It is averred, on information and belief, that John A. Logan, Jr., has reported to appellant that there was realized from the sale of boxes and box seats \$9,670, and that appellant has received of that amount \$5,800. It is admitted by the bill that appellee is chargeable with about \$21,075. Other items are mentioned in the bill which we do not deem necessary to state here. The bill shows that there has been no final accounting between the parties, and avers that the appellant has in its hands moneys derived from the gross income of the show, which, appellee avers on information and belief, is in excess of \$12,000, and avers that said moneys are deposited in the Continental National Bank and are subject to appellant's control, and that appellant received

said moneys as trustee for appellee to the extent of seventy per cent thereof.

The bill further alleges, as of complainant's own knowledge, that appellant has no property other than the leasehold of the Coliseum building, its fixtures and appurtenances, and that it, appellant, has issued bonds secured by mortgage on its said leasehold interest to an amount greatly in excess of the value thereof, and avers, on information and belief, that appellant is insolvent and in such financial circumstances that a suit at law by appellee against it would be unavailing. The bill prays for a reformation of the contract, for an accounting, that out of the moneys deposited in the Continental National Bank as aforesaid, the amount found to be due to appellee may be paid, and a writ of injunction issue, restraining appellant, its agents, etc., from withdrawing from the bank the moneys deposited, as aforesaid, etc., and for general relief. The court ordered an injunction as prayed, and the writ issued accordingly. Appellant's counsel contend that there is not a sufficient averment of the insolvency of appellant. The bill avers, in positive terms, and as of the complainant's own knowledge, that appellant's only property is its leasehold interest in the Coliseum building, and that said leasehold interest is mortgaged for an amount greatly in excess of its value. We think this a sufficient allegation of insolvency. It would be sufficient in a bill filed by a mortgagee for a strict foreclosure of the mortgage. *Wilson v. Geisler*, 19 Ill. 49; *Stephens v. Bichnell*, 27 Ib. 444.

We are of opinion that, in view of the allegation that appellant is insolvent, taken in connection with other allegations in the bill, there was probable ground for the court to believe that, unless enjoined without notice, appellant would withdraw the moneys from the bank to the injury of appellee, and this was sufficient to warrant an interlocutory injunction. 1 *High on Injunctions*, Sec. 22.

"An interlocutory injunction is merely a mode by which the court preserves the property in dispute, with the least injury to all parties, until it can finally determine their respective rights." 2 *Daniell's Ch. Pl. & Pr.* 1664.

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The same author says: "When the rights of the parties are doubtful the court will, on an application for an interlocutory injunction, consider the comparative injury which will result from granting or withholding the injunction, as well as the justice of the case as it appears on the evidence." *Ib.* 1664.

On the subject of notice Daniell says: "When the mere act of giving notice might be, of itself, productive of the mischief apprehended, by inducing him to accelerate the act in order that it might be complete before the time for making the application should have arrived, the court will award the injunction without notice, or even before service of a copy of the bill." *Ib.*

Appellant's counsel object that the affidavit is not a sufficient verification of the bill to warrant a preliminary injunction. The affidavit, in so far as the same is in support of the bill, omitting the venue, is as follows:

"Benjamin H. Brainard, being first duly sworn, upon his oath deposes and says that he is the treasurer of the said State Board of Agriculture, complainant in the foregoing bill of complaint, and that he has read the foregoing bill of complaint of the State Board of Agriculture, and knows the contents thereof; that the said bill, and the matters and things therein stated, is and are true of affiant's own knowledge, except those allegations in said bill of complaint made upon information and belief, and as to all such matters charged or made upon information and belief in said bill, he believes that such matters, as the same are alleged in said bill, to be true, and that the said bill, and each and every allegation thereof, is true."

Affidavits substantially the same in form have been repeatedly held insufficient by this court. *Deimel v. Brown*, 35 Ill. App. 303; *Siegmund v. Ascher*, 37 *Ib.* 122; *Brabrook Tailoring Co. v. Belding Bros. & Co.*, 40 *Ib.* 326; *Stirlen v. Neustadt*, 50 *Ib.* 378; *Werner Co. v. First Nat. Bk.*, etc., 55 *Ib.* 321; *Earle v. Earle*, 60 *Ib.* 360.

The reason for holding such affidavit insufficient is thus stated in *Stirlen v. Neustadt*, *supra*: "What matters

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there may be in the bill that are stated on information and belief can only be known by probing the mind of the pleader; but matters that are stated to be on information and belief can be ascertained by reference to the bill."

We do not feel warranted in departing from the long line of decisions of the court holding such an affidavit as the one under consideration insufficient, and substantially establishing a rule of practice, and might have reversed the order on the ground of insufficient verification of the bill, omitting consideration of the merits of the controversy; but inasmuch as the questions presented here may again arise in the Circuit Court in the further progress of the cause, we have thought it expedient to consider the bill on its merits. For the reason that the verification of the bill is insufficient, the order will be reversed.

Thomas Marshall v. City of Chicago.

1. **PRIVATE PROPERTY—Taken for Public Use.**—Private property may be damaged by the exercise of the police power, and yet, in the absence of a constitutional or statutory provision for compensation, there can be no recovery for such damage.

2. **SAME—Rule Under the Constitution of 1870.**—Under Section 18 of Article 2 of the present Constitution a recovery may be had in all cases where private property has sustained a substantial damage by the making and using of a public improvement.

Trespass on the Case, for damage to private property for public use. Trial in the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Judgment for defendant on demurrer to declaration. Appeal by plaintiff. Heard in this court at the March term, 1898. Reversed and remanded. Opinion filed July 21, 1898.

JOHNSON & McDANNOLD, attorneys for plaintiff.

Wherever private property has sustained a substantial damage by the making and using an improvement that is public in its character, damages need not be physical. *C. & W. I. Ry. Co. v. Ayers*, 106 Ill. 518; *L. E. & W. Ry. Co. v. Scott*, 132 Id. 435.

Adjacent lot owners may recover damage occasioned by the building and maintaining of a railroad in the streets of a city, by and with the consent of the municipal authority. *Penn M. L. Ins. Co. v. Heiss*, 141 Ill. 61.

This is well settled under the Constitution and laws of this State in a late action to recover compensation for the damage done to property by changing grades. *City of Joilet v. Blower*, 155 Ill. 416.

Damages ensuing by reason of the construction and operation of a railroad along and upon a street, which impairs the right and enjoyment of adjacent property, may be compensated for, and recovered in an action on the case by the owner. *Galt v. C. & N. W. Ry. Co.*, 157 Ill. 130.

Unreasonable use of highways gives adjoining owner action for damages. *Fritz v. Hobson*, L. R., 14 Chan. Div. 552.

Probable profits may be recovered. *Ripley v. G. N. Ry. Co.*, L. R., 10 Ch. App. 435; *Cripps on Compensation* (2d Ed.), 95; *Lloyd on Compensation* (3d Ed.), 67-114; *Wolf and Middleton on Compensation* (1st Ed.), 117; *Mayor of Montreal v. Brown*, 2 App. Cas. 168.

Damages to good will may be recovered. *White v. Commissioner of Public Works*, 22 N. T. L. S. (1870).

Loss of trade is loss of good will. The loss of trade is injury to the value of the land itself. *Senior v. Met. R. W. Co.*, 2 H. & C. 265 (1863).

Damage to interest in land necessarily includes damage to the business interest, by diverting it from its accustomed channels. *Cameron v. Charing Cross R. W. Co.*, 16 C. B. N. S. 430.

Loss of business, in addition to the market value of the land, may be recovered in condemnation cases. *Covington Str. Co. v. Piel*, 87 Ky. 276; *Borough of Norwalk v. Blanchard*, 56 Conn. 461; *Patterson v. Boston*, 20 Pick. 165.

Depreciation in value of a leasehold is recoverable. *Getz v. P. & R. R. Co.*, 105 Penn. St. 547; *S. C.*, 113 Penn. St. 214; *R. R. Co. v. Eby*, 107 Penn. St. 173; *Schuylkill Riv. R. Co. v. Kersey*, 133 Penn. St. 234; *W. P. R. R. Co. v. Hill*, 56 Penn. St. 465.

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Damages for interruption of business are allowed. *Allison v. Chandler*, 11 Mich. 549; *G. R. & I. R. R. Co. v. Weiden*, 70 Mich. 395; *C., S. F. & C. Ry. Co. v. McGrew*, 104 Mo. 282; *Hannibal Bridge Co. v. Schaubacher*, 57 Mo. 588.

CHARLES S. THORNTON, corporation counsel, and THOMAS J. SUTHERLAND, attorneys for defendant in error.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment rendered in an action on the case by plaintiff in error against defendant in error.

The declaration avers that plaintiff, by written indenture of lease, of date October 7, 1892, became the lessee from November 1, 1892, until April 30, 1894, of a certain lot in the city of Chicago, at a rental of \$990, to be paid to the lessor in monthly installments of \$55 in advance, which lease was, October 11, 1893, by written agreement of that date, extended from April 30, 1894, to April 30, 1895; that plaintiff was in possession of and occupying the east 32 feet of the lot; that the lot has a frontage of 32 feet on east Twenty-second street and extends of that width north 25 feet, and that the east line of said premises adjoins the west line of the right of way of the Chicago, Rock Island and Pacific and Lake Shore and Michigan Southern Railroad Companies, the railways of which companies crossed Twenty-second street immediately contiguous to plaintiff's premises, at the same level and grade as the surface of the plaintiff's premises; that Twenty-second street was a much-traveled street and furnished the only means of ingress and egress to and from plaintiff's premises, which means of ingress and egress were of great value to said premises; and by reason of the circumstances aforesaid and the proximity to the premises of said railroads, said premises and leasehold were of the value of, to wit, \$5,000, and also, by reason of the circumstances aforesaid, plaintiff, who was engaged in the retail liquor and saloon business, on said premises, had a large and profitable business, etc. The declaration then sets out in full an ordinance of great length, passed by the city

council of defendant July 9, 1894, which requires the above named railway companies to elevate their railway tracks above Twenty-second and other streets, and among other things, provides for the construction of a subway at the intersection of the railway right of way with Twenty-second street and in Twenty-second street, and plaintiff avers that the railway companies, in pursuance of said ordinance, to wit, October 10, 1894, excavated and lowered the grade of Twenty-second street three feet and eight inches in front of his said premises, and that said street has ever since been maintained in said lowered condition, and that the said lowering of the grade has greatly interfered with the access to and egress from the plaintiff's premises, and has obstructed and impeded travel along Twenty-second street, by means whereof plaintiff's business and the profits thereof have greatly decreased and the market value of his said leasehold was greatly depreciated, to wit, \$5,000, etc.

The defendant demurred generally to the declaration, thus merely raising the question of law whether the declaration states a cause of action. The court sustained the demurrer, and gave judgment against the plaintiff for costs.

Defendant's counsel have filed an elaborate argument in support of the judgment, which we have carefully considered. The argument may be briefly summarized as follows:

The ordinance of July 9, 1894, requiring the railroad companies to elevate their tracks, construct sub-ways, etc., was passed in the exercise of the police power. The provision of Section 13, Art. 2 of the Constitution, namely, "Private property shall not be taken or damaged for public use without just compensation," must be construed with reference to the police power. So construing it, there can be no recovery on the facts stated in the declaration.

Counsel admit in their argument that the railroad companies were, by the ordinance, required to elevate their tracks for the protection of the public in passing along the streets of the city; that the crossing the streets at grade was a menace to life and property; in other words, that the improvement was ordered for the convenience and safety of

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the public, for public use. The demurrer admits all the material allegations of the declaration, which are well pleaded, among which is the allegation that the plaintiff's premises were depreciated in value—damaged—by the work ordered. It stands admitted, therefore, that the plaintiff's property was damaged for public use, and to hold that in such case there can be no recovery, would be to nullify the constitutional provision cited. It is undoubtedly the law, sustained by numerous decisions, many of which have been cited by defendant's counsel, that private property may be damaged by the exercise of the police power, and yet in the absence of a constitutional or statutory provision for compensation, there can be no recovery for such damage; but no case has been cited, nor do we believe any can be found in which, there being a provision for compensation for damage occasioned to private property for public use, it has been held that there could be no recovery for such damage. The case of *C. & N. W. Ry. Co. v. City of Chicago*, 140 Ill. 309, relied on so confidently by counsel for the defendant, has no application to such a case as the present. In that case the city, by ordinance and condemnation proceedings in pursuance thereof, extended a street across the right of way and tracks of the railway company. The company claimed as damages expenses which it would incur in grading and planking the crossing, maintaining a gate and power house, paying the salary of a gate tender and making repairs. The court say: "The question is whether, in a case where a city institutes a condemnation proceeding to open or extend a street across a railroad already constructed, the company owning such railroad is entitled to be allowed, as part of its just compensation, the amount of its expenses in constructing and maintaining the street crossing." This was the question discussed by the court, and the court decided that there could be no recovery for such expenses, holding that railways are public highways of the State, and as such subject to legislative supervision; that the company took its charter subject to the right of the public to extend the public highways and streets across its right of way, and

also subject to the exercise of the police power of the State; that the statutes in force requiring the construction and maintenance of crossings were police regulations intended for the safety of persons and property, and were applicable to the company, and that the company could not claim compensation for expenses incurred in complying with such regulations. The court did not hold that the company would not be entitled to any compensation in case it appeared that its right of way would be decreased in value by the extension of the street across it. On the contrary, the court said: "So far as the taking of the strip was concerned, the measure of the compensation would be the amount of the decrease in value of the use for railroad purposes, which should be caused by the use for the purposes of a street, such use for the purposes of a street being subject to the use of the companies for railroad purposes." The writer of this opinion presided at the trial of the case in the Circuit Court, and took the same view of the law as did the Supreme Court on appeal, and there being no competent evidence of what the decrease in value, if any, would be of the right of way of the company for railroad purposes by the extension of the street across it, awarded merely nominal damages.

In *Rigney v. City of Chicago*, 102 Ill. 64, the facts were that Rigney owned a lot on Kinzie street in the city, along which railway tracks were constructed and operated. Kinzie street runs east and west, and west of Rigney's lot, about 220 feet, Halsted Street, a north and south street, intersects and crosses Kinzie street and the railway tracks. Kinzie and Halsted streets were on the same grade, so that there was free access from Rigney's premises by the way of Kinzie street to Halsted and from Halsted to his premises. The city caused to be constructed on the line of Halsted street, and across Kinzie street and the railway tracks thereon, a viaduct or bridge, which cut off the access above mentioned, by reason of which, Rigney claimed, and the evidence showed, the market value of his property was decreased. The construction of the viaduct was as much an

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exercise of the police power of the city as was the ordering of the elevation of the railway tracks and the construction of the sub-ways in the present case; yet the court held that Rigney was entitled to recover, basing its decision as to the law solely on the constitutional provision requiring compensation to be made when private property is damaged for public use.

The contention of defendant's counsel, if sustained, would operate to make the law now as it was prior to the adoption of the present constitution, namely, that there could be no compensation for private property merely depreciated in value by reason of a public improvement, such as constructing a viaduct across a street, or raising or lowering the grade of a street or highway, without any physical injury to the *corpus* of the property, but only in case of an actual taking or a direct physical injury. But the court in *Rigney v. Chicago*, *supra*, shows clearly that the very object of inserting the words "or damaged" in Sec. 13, Art. 2 of the Constitution, was to change the organic law and give a remedy to the owner of private property in cases where previously there was none. The *Rigney* case has been cited in a large number of subsequent cases by the Supreme Court with approval, and the doctrine announced in that case is the established law of the State. In *C. W. & I. R. R. Co. v. Ayres*, 106 Ill. 511, the court, referring to the *Rigney* case, say: "The conclusion there reached was, that under this constitutional provision a recovery may be had in all cases where private property has sustained a substantial damage by the making and using a public improvement."

In *City of Joliet v. Blower*, 155 Ill. 414, which was an action for damages occasioned to the property of the plaintiff by changing the grade of a street, the court say: "It is well settled that, under the constitution and laws of this State, there is a right of action to recover compensation for the damage done to the property of appellees by changing the grade on Exchange street," citing *Rigney v. City of Chicago* and other cases.

To the same effect is *City of Bloomington v. Pollock*, 141 Ill. 346; see also *City of Pekin v. Brereton et al.*, 67 Ill.

477, and *Stack v. City of East St. Louis*, 85 Ib. 377. Notwithstanding the cases cited *supra*, and other similar cases with which defendant's counsel must be presumed to be familiar, we find the following printed in italics in their argument:

"It is asserted that there are some well considered adjudications which oppose the contentions of this brief, but we have not been able to find them; and undoubtedly it will be discovered that in every such supposed case, the application of the principle relied upon here was neither presented, insisted upon, nor considered, and hence the decisions in those cases are not authorities here."

The "principle relied on" by defendant's counsel, and to the discussion of which their entire argument is devoted, is that the improvement having been ordered in the exercise of the police power, there can be no recovery for damage occasioned by it to private property. Counsel assume that this contention was not made in any of the cases decided by the Supreme Court, and also assume that it was not noticed or considered by the court in the *Rigney* case, and other like cases, that the ordering of the improvement involved was an exercise of the police power. We can not indulge in the latter assumption, but we think it highly probable that it never occurred to the Supreme Court that the police power is of so great potency as to supersede and nullify an express provision in the fundamental law of the State.

The question whether the improvement was ordered in the exercise of the police power, or in the exercise of some other power, is wholly immaterial to the plaintiff's case, because no matter what the power in the exercise of which the ordinance of July 9, 1894, was passed, if the plaintiff's property was damaged as claimed in his declaration, he is entitled to compensation. The declaration avers loss of business and prospective profits. We must not be understood as holding that this is a proper element of damage in such a case as the present. We base our decision solely on the allegations of the declaration to the effect that the plaintiff's leasehold was damaged for public use.

The judgment will be reversed and the cause remanded.

**Charles S. Berry and Hattie D. Berry, for the use of
Hattie D. Berry, v. Gerard J. L. De Bruyn.**

1. **PARTNERS—Suits Between Will Not Lie at Law—Exception to the Rule.**—As a general rule, an action at law will not lie by one partner against another, but among the exceptions to this rule is that of a separate and distinct security or negotiable instrument given by one partner to another on the partnership account, in which an action at law by one partner against the other will lie.

2. **SAME—Where One May Sue Another at Law.**—One partner may sue his copartner at law, on a note, obligation, or even an account stated, ascertaining the sum due. The object of going into equity is to get an account concerning the matters about which the partners are unable to agree.

3. **SAME—Suits on Contracts Between.**—To hold that where partners have agreed and given legal shape to their contracts, such contracts can not be enforced at law, would be equivalent to holding that either the subject was of such a nature, or the relation of the parties such that the law would not permit them to contract.

4. **SAME—Contracts Between.**—Where there is not a legal prohibition, partners may contract upon the principle that the law acts by restraint and not by conferring rights.

Assumpsit, on a promissory note. Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Case dismissed for want of jurisdiction. Judgment for defendant for costs. Error by plaintiff. Heard in this court at the March term, 1893. Reversed and remanded. Opinion filed July 21, 1893.

CRATTY, JARVIS & CLEVELAND, attorneys for plaintiffs in error.

MALCOLM DALE OWEN, attorney for defendant in error.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

Defendant in error, on December 2, 1895, made his promissory note of that date for the sum of \$30,000, payable to the order of Charles S. Berry or his wife, Hattie D. Berry, ninety days after date, with interest at six per cent per annum, and reciting that it was given for services and

expenses rendered the maker from August 21, 1895, to November 16, 1895. It does not appear to whom the note was delivered, but, not having been paid, this suit was begun August 19, 1897, in the name of the payees for the use of Hattie D. Berry, the declaration being the common counts. The defendant pleaded the general issue and a special plea that the note was given without any good and valuable consideration whatever. The plaintiffs took issue on both pleas, and later the defendant gave notice that he would at the trial give evidence of certain matters of set-off, specifying the same. At the trial December 1, 1897, before the court and a jury, the plaintiffs offered the note in evidence, and rested. The defendant then offered evidence tending to show there was no consideration for the note and rested, whereupon the plaintiffs offered evidence in rebuttal, tending to show that there was some consideration for the note, and also tending to show that at the time the note was given, the defendant and Hattie D. Berry, one of the payees of the note for whose use the suit was brought, and the wife of Charles S. Berry, the other payee, were partners in the detective business or detective agency; and that said Charles S. Berry was in the employ of the firm during the period when the services mentioned in the note were rendered, and that the note was given in part for services rendered by Mrs. Berry and in part by her husband, all the services being rendered in the firm business.

When the evidence on the rebuttal developed the existence of a partnership between Mrs. Berry and the defendant, the court entered the following order, viz.:

"During the examination of witness Charles S. Berry, it appearing to the court that the note is a partnership matter and can not be adjudicated in this suit, therefore the court of its own motion and against the objections of the plaintiffs, suspends the further examination of witnesses or introduction of evidence, and dismisses the case for want of jurisdiction." And thereupon also gave judgment in favor of the defendant and against the plaintiffs for costs. To reverse this order and judgment this writ of error is prosecuted.

We have not been favored by either counsel with the citation of a single authority against or in support of the action of the learned trial judge. The duty of counsel is to assist the court in arriving at correct conclusions in the cases submitted. They have not performed that duty in this case so far as aiding us in the determination of the legal proposition involved is concerned. This court has the right to expect the benefit of the assistance and experience of counsel in every case, not only as to facts, but the law bearing upon the questions at issue. If counsel are derelict in their duty to this court as well as their clients, the highest prerogative of the attorney and solicitor, they must bear the consequences if the conclusions we may reach fail to administer the justice and equity which suitors are entitled to receive. The wisest and most equitable and righteous decisions result not so much from the ability, industry and conscientious discharge of duty by the judges, as from the learning, patience, industry and conscientious effort on the part of the bar to aid the court in reaching just and correct conclusions.

Numerous errors are assigned, but we are justified in assuming that they are all waived by failure to argue any, except that the court erred in suspending the evidence and dismissing the case for want of jurisdiction.

It is true, as a general rule, that an action at law will not lie by one partner against another, but among other exceptions to this rule is that of cases of a separate and distinct security or negotiable instrument given by one partner to another, on the partnership account, in which it is held an action at law by one partner against the other will be allowed. 2 Bates on Partnership, Secs. 878, 879 and 880; 1 Collyer on Partnership, Secs. 257, 258 and 259; Chamberlain v. Walker, 10 Allen, 429; Sturges v. Swift, 32 Miss. 240; Rockwell v. Wilder, 4 Metcalf, 560; Crater v. Bininger, 45 N. Y. 546, and cases cited; Ryder v. Wilcox, 103 Mass. 27; Van Ness v. Forrest, 8 Cranch, 30.

In the Sturges case, *supra*, the court said: "One partner may sue his copartner at law, on a note, obligation or even

an account stated, ascertaining the sum due. The object of going into equity is, to get an account concerning the matters about which the parties are unable to agree; but to hold that when they have agreed and given legal shape to their contracts, such contracts can not be enforced at law, would be equivalent to holding that either the subject was of such a nature, or the relation of the parties such, that the law would not permit them to contract. The almost universal rule is, that where there is not a legal prohibition, parties may contract upon the principle that the law acts by restraint and not by conferring rights, and affirmed a judgment upon a due bill, given by one partner to another, relating to partnership matters, the partnership having continued after the execution of the due bill.

In the Crater case, *supra*, the court said: "The note was not a partnership note; it was not given by or to the firm. It was given by one member of the partnership to another, upon a good consideration, and an action upon it did not involve an examination of the partnership accounts;" and held that an action at law could be maintained on the note in question, although it was given for the business purposes of the partnership.

In the Ryder case, *supra*, which was an action at law to recover damages for a breach of a partnership agreement, and for profits which the defendant partner refused to pay over, the court held the action would not lie when it could not be properly tried without going into the partnership accounts, but said: "Whatever the nature of the agreement, it must be one in which the defendant binds himself personally to the plaintiff" before an action at law could be maintained upon it.

In the Van Ness case, *supra*, which was a suit by Forrest, the payee of a note, given by his partner to Forrest for merchandise sold to the defendant partner, by the firm of which they both were members, Marshall, C. J., delivering the opinion of the court, said: "The principle that a company can not sue its members does not apply to the case, nor does the principle that a partner can not sue a partner,

In Matter of Petition of Eichenbaum Plumbing Co.

on a partnership transaction, apply to any case where a note in writing is given for money, not to a firm, but to an individual member."

In view of these authorities, we are of opinion that it did not follow that because the note in question was given partly for services of an employe of the firm in its business and partly for services of a partner of the defendant, that there was no jurisdiction in the Superior Court of the action upon the note, and that the learned trial judge should have submitted the issue as to whether there was a consideration for the note to the decision of the jury.

The judgment is reversed and the cause remanded.

In the Matter of the Petition of the Eichenbaum Plumbing Co.

1. **MANDAMUS**—*When it Will Issue from This Court.*—The Appellate Court can only issue a writ of mandamus in aid of its jurisdiction.

2. **APPELLATE COURT**—*What is Not in Aid of its Jurisdiction.*—The granting of a certificate of evidence on a motion to set aside an order appointing a receiver is not in aid of the jurisdiction of the Appellate Court in the appeal from such order.

3. **APPELLATE COURT PRACTICE**—*What is Not an Appealable Order.*—An order overruling a motion to set aside an order appointing a receiver is not an appealable order.

Mandamus.—Original proceedings in this court. Demurrer to petition sustained. Opinion filed June 9, 1898.

MARTIN & MARTIN and J. N. FELTON, attorneys for petitioner.

B. M. SHAFFNER, attorney for respondent.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

This is a petition for a writ of mandamus to compel the Hon. Farlin Q. Ball, judge of the Superior Court, to sign

a certificate of evidence. The certificate presented to him for signature is attached to the petition. The respondent has filed a demurrer. The certificate presented for signature purports to contain the evidence read on a motion to set aside an order of the court appointing a receiver in the case of Elias Levee et al. v. Paul Eichenbaum et al., which case is pending in this court on appeal from the order appointing the receiver. This court can only issue the writ of mandamus in aid of its jurisdiction, and a certificate of evidence on a motion to set aside an order appointing a receiver would not be in aid of the jurisdiction of the court in the appeal from the order appointing the receiver. The order overruling the motion to set aside the order appointing the receiver is not an appealable order. The certificate, if signed, could not in any way aid the court in the appeal case. It would be wholly irrelevant. The demurrer will be sustained.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

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FOURTH DISTRICT—FEBRUARY TERM, 1898.

John Penn, Trustee, etc., et al., v. W. M. Fogler et al.

1. **EQUITY PRACTICE—Sustaining Decrees.**—Where a cause is heard by the chancellor in open court upon oral and documentary testimony, his finding of facts should not be disturbed unless clearly contrary to the weight of evidence.

2. **WILLS—Intention of the Testator Must Prevail.**—It is a cardinal rule of construction that the intent of a testator must be given effect when it can be ascertained, and where the testator has not accurately or completely expressed his meaning by the words he uses, such words may be supplied from the context as will effectuate his intention.

3. **DECREES—In Invitum and by Consent.**—Where a defendant is ruled to answer, and failing to do so, default is taken and decree entered *pro confesso*, such is a decree *in invitum*, and not a consent decree.

4. **ADMINISTRATORS—With the Will Annexed—Power to Sell Real Estate.**—An administrator with the will annexed, has no power to sell real estate without an order of court, although the will may have directed its sale by the executor.

5. **SAME—Duties in the Nature of Trusts.**—In the administration of personal property, and trusts in relation to the payment of legacies from personal property or its earnings, all the duties of an executor, which rest upon him by virtue of his office, devolve upon an administrator *cum testamento annexo*, unless it appears from the will that such duties are cast upon the executor by reason of personal trust and confidence.

6. **SAME—Jurisdiction of the County Court—After Decree Construing the Will.**—Where a controversy arises over the construction of a will and the distribution of trust funds in the hands of an administrator with the will annexed, a proper disposition of the case will not take the estate out of the hands of the County Court, but when the will is construed, and the rights of the parties determined, the settlement of the estate can proceed in the County Court.

7. *PARTNERSHIP—Liability of a Copartner for Misapplication of Trust Funds.*—The knowledge of one partner that a trust fund is misapplied does not make his copartners liable if, in the vicissitudes of business honestly conducted, the investment proved unprofitable.

8. *SAME—Liability for Breach of Trust.*—If in making an investment one partner is guilty of a breach of trust, and his partners have knowledge of such breach, all the partners having such knowledge will be chargeable as co-trustees.

Bill to Construe a Will and for Relief.—Error to the Circuit Court of Fayette County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the February term, 1898. Affirmed. Opinion filed August 31, 1898.

STATEMENT.

Nathaniel M. McCurdy, a resident of Vandalia, died testate September 29, 1876, leaving surviving him no widow, and no child or descendant of any child. By his will he bequeathed two hundred shares of the capital stock of the National Bank of Vandalia, having a par value of one hundred dollars per share, to McKendree College, a corporation organized under the laws of the State of Illinois; and two hundred shares of said stock to the Board of Church Extension of the Methodist Episcopal Church, a corporation organized under the laws of the State of Pennsylvania. The total capital stock of the bank was \$100,000. At the time of the death of the said McCurdy the shares of stock were at par and probably at a premium.

Out of the earnings of said shares, \$3,000 was to be paid annually to Mary K. Marr, and after death to her daughters, Henrietta Marr and Imogene Marr, so long as they lived, and to the survivor during her life. The mother is dead. The daughters are still living. After the payment of the legacies charged against the bank stock, including the annuities to the Marrs, the shares of bank stock were to be transferred to the corporations last named.

No executor or trustee was named in the will.

George W. Brown, the cashier of said National Bank, filed and probated the will, and was appointed administrator with the will annexed. Brown filed his inventory as admin-

istrator on January 8, 1877, but the estate is still pending for settlement in the County Court of Fayette County. He received in custody, as administrator, all of the personal property of McCurdy, including 400 shares of bank stock.

The will directed a sale of all the property, real, personal and mixed (except the bank stock), of which the testator died seized or possessed. At the February term, 1877, of the Fayette County Circuit Court, Brown filed a bill in chancery, the object of which was, as he testifies, "to construe the will and determine my powers under it to conduct the business, including the bank stock." There is a disagreement between the parties as to the scope of this bill. It has been lost or mislaid. Counsel for complainant in the cross-bill, in whose possession the bill last was, testifies that it only asked for authority to sell real estate.

The Marrs, McKendree College and the Board of Church Extension were made parties defendant to the bill, and their appearance was entered in writing. The decree was a final decree and is still in effect. As administrator with the will annexed, Brown sold all the property of the deceased, except the bank stock; he assumed the charge and management of this stock; represented it at the meetings of the directors and stockholders of the bank, collected the dividends thereon, paid the definite legacies charged against it, and paid the annuities to the Marrs up to the time of the surrender of the bank's charter, and for some years thereafter.

McCurdy was the president of the said National Bank of Vandalia, from its organization in 1866, to the date of his death. Brown, during most of that time, acted as cashier. On the 1st of April, 1883, said bank, in pursuance of a resolution adopted by its stockholders, surrendered its charter, and did no business after April 2d. The chief reason for this was, the bonds which secured its notes had matured and were called for redemption, and the premium on bonds, which would be required to take their place, was twenty-eight per cent. It was not thought advisable to pay this premium in order to continue as a national bank. The banking business was therefore continued by a private bank, called the

Bank of Vandalia, which commenced operations on the day after the national bank ceased, at the same place, with the same assets, stockholders and directors. Brown, under the name of administrator with the will annexed, continued in this bank, as an investment, whatever assets of the McCurdy estate there were remaining in the said National Bank, when its charter was surrendered.

What the value of these assets was, at that time, does not clearly appear.

The report of the National Bank to the comptroller, December 30, 1882, showed total resources to be \$330,673.96; total liabilities, \$190,928.27, leaving net resources, \$139,745.69.

But of this net balance there were many debts, imperfectly secured, and resulting in a heavy loss.

Brown, who was cashier of both banks for many years, testifies, "from present standpoint as I view it now, had we closed up the business at the time of the reorganization, I don't believe the stockholders would have realized fifty cents on the dollar of their stock." He further testifies that "in the light of subsequent developments," its capital was impaired at the time of the reorganization to the extent of \$69,088.

The Bank of Vandalia proved to be a disastrous investment. It continued in operation until May 1, 1895, and was then succeeded by the First National Bank of Vandalia. Steps were taken to close up the affairs of the Bank of Vandalia at the September term, A. D. 1896, of the Fayette County Circuit Court, by the original bill in this case filed.

Said original bill was filed by W. M. Fogler, G. D. Gerould, George W. Brown, administrator with the will annexed of the estate of Nathaniel M. McCurdy, deceased, W. M. Farmer, J. J. Brown, George Leidig, C. E. Capps, Joseph A. Gordon, administrator of the estate of F. Reman, deceased, Fred. M. Whiteman and J. E. Whiteman, executors of the last will and testament of James M. Whiteman, deceased, Lucinda R. Haller, Maud Haller, Maud Haller,

administratrix of the estate of F. B. Haller, deceased, Mary Strayer, Olivia Whiteman, Julia Reman, and Julia Reman, guardian of Fred. G. Reman, minor heir of F. Reman, deceased, Mary L. Henninger, Julia Fouke, Mary Wagner, Josephine Gregory, Ada Perkins and Fred G. Reman, minor heir of F. Reman, deceased, by Julia Reman, his guardian and next friend, against Simeon Perkins, Benjamin Perkins, Harriet Perkins, Imogene Marr, Henrietta Marr, McKendree College, and the Church Extension Society of the Methodist Episcopal Church.

The bill avers that on and prior to April 2, 1883, there existed in the city of Vandalia, Illinois, a national bank, known as the National Bank of Vandalia, doing a general banking business, under a charter issued to it under authority of the National Banking Act, with a paid up capital stock of \$100,000. That on April 2, 1883, the said stock was owned and controlled by the following persons, in the following proportions: N. M. McCurdy estate (George W. Brown, administrator), \$40,000; Lydia A. Fogler, \$15,000; W. M. Fogler, \$9,000; F. Reman, \$15,000; F. B. Haller, \$6,000; Simeon Perkins, \$4,000; James M. Whiteman, \$2,000; G. D. Gerauld, \$2,000; George Leidig, \$1,000; Mary I. Henninger, \$2,000; Charles E. Capps, \$1,300; Josephine Gregory, \$1,400, and Julia Fouke, \$1,300.

That the bonds deposited by said bank to guarantee its circulation, were called in for redemption. That premium on United States bonds being at that time high, the said stockholders decided to surrender the charter, and continue the banking business as a copartnership, which was done. That from and after April 2, 1883, the same persons continued said banking business, with the same capital, as a partnership, until May 1, 1895, with the exceptions herein set forth. The partnership agreement being that the partners were to share in the profits and losses, in proportion to the amount invested by each respectively.

That Lydia A. Fogler withdrew June 18, 1887, and thereafter until May 1, 1895, said partnership was carried on with a capital of \$85,000.

That Simeon Perkins died August 25, 1890, leaving Ada Perkins, his widow, and Simeon, Benjamin and Harrietta Perkins his only children and heirs at law, who succeeded to his rights and interests in said partnership. That upon the settlement of his estate, \$1,500 became the property of the widow, and \$2,500 became the property of the heirs. That the same was continued until the dissolution of the firm in said bank.

That Whiteman died testate February 10, 1894, leaving Olivia Whiteman, widow, and Fred M. J. E. and George Whiteman, only children and heirs at law. That by the last will and testament of said Whiteman, his interest became the property of said Olivia Whiteman, who continued same therein until the dissolution of the firm.

That on ——— W. M. Farmer and J. J. Brown each bought of Mary I. Henninger \$500 of her interest, and thereupon were admitted as partners. That on ——— Mary Wagner bought of W. M. Fogler \$4,000 of his interest and was thereupon admitted as a partner. That on the dissolution of the firm the interests of its members were as follows : N. M. McCurdy estate, \$40,000; F. Reman, \$15,000; Mary Wagner, \$4,000; W. M. Fogler, \$5,000; F. B. Haller estate, \$6,000; J. M. Whiteman estate, \$2,000; G. D. Gerould, \$2,000; Mary I. Henninger, \$1,000; W. M. Farmer, \$500; J. J. Brown, \$500; George Leidig, \$1,000; C. E. Capps, \$1,300; Josphine Gregory, \$1,400; Julia Fouke, \$1,300; Ada Perkins, \$1,500; heirs of Simeon Perkins, \$2,500.

That during the continuation of business a large amount of real estate was taken in the settlement of bad debts. That the firm has other assets consisting of notes and other evidences of indebtedness. That said assets should be reduced to money to pay creditors and make distribution. That the real estate is not held in the firm name, but for convenience, in the name of different members of the firm, in trust. That the parties can not sell and make title on account of the minority of Reman and the Perkins heirs. That no settlement of the partnership affairs has ever been made.

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Avers that the will of McCurdy provided for the payment of an annuity to Henrietta and Imogene Marr, during their life, out of the earnings of the capital invested in the banking business, and at their death, said capital to be divided between McKendree College and the Church Extension Society of the Methodist Episcopal Church, one-half to each.

Prays for the appointment of a guardian *ad litem* for minor defendants, for a receiver of the firm assets, for instructions to receiver to wind up partnership affairs under the direction of the court, and after payment of liabilities, for a distribution, and for general relief.

Schedule of real estate was attached to and made a part of bill as Exhibit "A."

McKendree College, the Board of Church Extension, and Henrietta Marr and Imogene Marr entered their appearance as parties defendant. Proceedings were had resulting in the appointment of a receiver who took possession of the firm assets.

At the same term of court, McKendree College and the Board of Church Extension filed their bill in chancery, making George W. Brown and the Marrs defendants, setting up the will and death of McCurdy, and praying for the appointment of a trustee to carry out the provisions of the will in relation to the bank stock. A decree was had appointing plaintiff in error, John Penn, trustee, and ordering Brown to account to said Penn for said fund, and to turn the same over to him. At the same term of court, said trustee, upon his own motion, was made party defendant to the original bill to close up the affairs of the Bank of Vandalia, and answered said bill. Said answer admits the formation of a partnership to do a banking business; avers that Brown was a partner and that he contributed the proceeds of the 400 shares of National Bank stock to the partnership assets; that all the partners knew that Brown had said funds as administrator of the McCurdy estate, and was subject to the order of the Fayette County Court. Avers that Brown had no authority to make this invest-

ment. Admits that said copartners agreed to share the profits and losses of the partnership, but denies any such agreement on the part of McCurdy's legatees.

Having answered the original bill, plaintiff in error filed his cross-bill, which avers his appointment as trustee; the death of McCurdy; the probate of his will; his ownership of 400 shares of the capital stock of the National Bank of Vandalia; its bequeathal to McKendree College and to the Board of Church Extension; its value as a hundred dollars a share at the time of McCurdy's death; the annuity of \$3,000 to be paid out of the earnings of the bank stock to Mary Marr during her life, and at her death to her daughters, Henrietta Marr and Imogene Marr, in equal parts, and at the death of either, the survivor to receive the whole \$3,000 annually during her life. Avers the death of Mary Marr, and that her daughters are still living. Avers the appointment of Brown as administrator with the will annexed, and that he is still acting as such, and that the estate is still unsettled; that as such he received the said bank stock, which was then worth \$40,000. Avers the surrender of the charter of the national bank, and the formation of a partnership by the stockholders and Brown to transact a banking business; that they called the partnership fund "capital stock," and that Brown contributed the proceeds of the 400 shares of the National Bank stock to this partnership fund; that each of his copartners knew that no part of this amount belonged to Brown, but knew that it was the property of McCurdy's legatees. Avers that Brown was chosen cashier of said bank and continued as such until it ceased to do business in May, 1895; that among its liabilities is the said sum of \$40,000, with lawful interest thereon, which is due complainant in cross-bill as trustee.

The cross-bill makes all parties to original bill parties defendant to the cross-bill, except McCurdy's legatees, and prays that the \$40,000 and interest be deemed a liability of said partnership and a prior lien upon its assets; and that if the assets are not sufficient to discharge said liability that a money decree for the residue be rendered against defendants to cross-bill, and for general relief.

Josephine Gregory, Julia Fouke and Olivia Whiteman, were, by order of court, dismissed as complainants in original bill, and made parties defendant with leave to answer.

They answered, denying that they entered into said partnership as partners.

Joint and separate answers of all of the defendants, except George W. Brown, were filed. They deny that the bank stock was worth \$40,000 when Brown received it as administrator, and deny that he contributed \$40,000 to the partnership, which was a part of the McCurdy estate, or that they had notice of it; and deny indebtedness to the beneficiaries of McCurdy. They aver that said national bank ceased to do business, but that the same business was carried on at the same place, with the same directors, stockholders and assets. Aver that the continuation of said business in this way was in accord with the terms, conditions and true construction of McCurdy's will. Aver that whatever use was made of said fund, by either of said banks, was well known to McKendree College and the Board of Church Extension; that they consented thereto and acquiesced therein, from the death of McCurdy until the filing of the cross-bill, a period of twenty-three years; and set up *laches*, and the ten and five year statutes of limitation. Deny that cross-complainant is entitled to a prior lien on the assets of the copartnership.

The separate answer of George W. Brown, in addition to the foregoing answer, avers that it was the duty of the administrator to keep said bank stock invested to pay the annuities; and that McKendree College and the Board of Church Extension are not entitled to the possession of said bequest until after the death of the annuitants. Avers that he retained the stock in the national bank as long as it had existence, and then retained it in the private bank, the change being in name only. That at the time of the surrender of the charter of the national bank, the McCurdy stock was not worth \$40,000 or any considerable portion thereof. That the said charter was surrendered because the bonds were called in for redemption, and other

bonds were not bought because the premium was too high. That the total amount received on sale of bonds, when charter was surrendered, was less than \$10,000. That the organization of said partnership to continue the business was what prudent and careful men would have done under the circumstances. That McKendree College and the Board of Church Extension knew it at the time of the change and consented to it, acquiesced in it, and ratified the same, and counseled and advised with defendant on frequent occasions about the business.

W. M. Fogler et al. amend answer to original bill averring filing of bill by Brown in Circuit Court of Fayette County, at the February term, 1877, for construction of will, and for the appointment of a trustee to carry out the provisions of the will concerning the bank stock, and for authority to sell the real estate. That McKendree College and the Board of Church Extension were defendants thereto and entered their appearance in writing. That a decree was had empowering complainant to carry out all the provisions of the will and especially gave him all powers, rights, duties and authority that an executor could or would have had if named in the will. That said decree gave Brown full authority to continue said fund in partnership bank.

Brown amended his answer, setting up in addition the same as above. Three reports were made by him as administrator to the County Court of Fayette County. The first covers the time from November 30, 1876, to March 8, 1879, the date of filing the report. In it he charged himself with six five per cent semi-annual dividends on the stock, amounting to \$12,000, and takes credit for \$3,000 legacy paid to M. E. Church, and five semi-annual annuities to Mary K. Marr, of \$1,500 each, amounting in all to \$10,500. He charges himself also with a balance due the estate of \$50,471.50, which includes the \$40,000 bank stock. The second report is from March 8, 1879, to February 18, 1884, and is filed March 17, 1884. In it he charges himself with interest to February 18, 1884, amounting to \$12,916.06, and takes credit for ten semi-annual annuities to Imogene and

Henrietta Marr, amounting to \$15,000. He charges himself with a balance of \$40,000, representing the bank stock.

The third annual report covers the time from February 18, 1884, to February 18, 1896. In it he charges himself with fifteen items of dividends to January 15, 1895, aggregating \$33,600, and takes credit for sixteen semi-annual annuities of \$1,500 each, and two of \$1,000 each, to Imogene and Henrietta Marr, in all \$26,000. He also takes credit for \$13,200 commissions, and for \$25 paid for legal services, and claims a deficiency due him of \$5,625. He also charges himself with 400 shares of bank stock in the Bank of Vandalia, total principal \$40,000.

The clauses of the will important to be considered are as follows:

“Also I give and bequeath unto my sister, Mary K. Marr, now of Portland, State of Maine, three thousand dollars annually, out of dividends to be made on the earning of my shares of stock of the N. B. of V., or semi-annually, if so preferred by the bank, beginning as soon after my decease as may be convenient, and continued as long as she may live, which can not, in the common course of nature, be long—and after her death, the same to be divided between her two daughters, Imogene Marr and Henrietta Marr, as long as they may both live. At the death of either, let the same be paid to the survivor, as long as said survivor shall live, at the death of whom it shall cease.

“The means to meet and discharge all the legacies in this will hitherto devised will be found in the earnings of my bank stock, and when they are all fully discharged I hereby will, bequeath and devise unto the proper government of McKendree College, for the use and behoof of said college, to endow and support, and maintain and continue in use a professional chair, to be known as the ‘McCurdy Professorship of the Pure and Applied Sciences;’ two hundred shares of one hundred dollars each, to be transferred on the books of the National Bank of Vandalia, to the credit of said McKendree College, the earnings of which shall be appropriated exclusively to the salary of the professor and

the purchase of apparatus for the use of such chair, in such proportions as the government of the college may agree upon. The said stock shall ever be considered as a perpetual endowment of said professorship, and no part thereof shall ever be diverted to any other use, but it shall be kept upon the best interest obtainable, and the interest alone annually expended. After the transfer of stock to the college or its authorized agent is made, and the college becomes the legal proprietor of that amount of capital stock, it, the college, will be entitled to a participancy in the management of the National Bank of Vandalia, and may continue so, or sell out the stock and invest elsewhere, as they may determine, for the benefit of the endowment, but as the condition of things now is, I would advise that it be kept as stock in the bank, so long as the bank may hold an existence as such, and then seek other investment.

“I also give, devise and bequeath to the ‘Church Extension Society’ of the Methodist Episcopal Church, a body corporate under the laws of the State of Pennsylvania (the corporate name of the society may, at this writing, be somewhat changed, but let it be understood that I mean the society once known by the above title), two hundred shares of the capital stock of the ‘National Bank of Vandalia,’ together with all the rights and privileges thereunto belonging or in any way appertaining, and as it is but a natural desire on the part of most men to have kept alive the name and remembrance of departed loved ones, and that it may induce others to follow my example, I make it a condition in receiving this legacy, on the part of the ‘Church Extension Society,’ that it shall ever be known in both law and equity, as the ‘McCurdy Fund for Church Extension.’ I also will and ordain that my executors shall on the best terms they can make and within a reasonable time after my death, sell all the property, real, personal and mixed, of which I may die seized and possessed, or to which I may be entitled at the time of my decease, and the avails of such sale, after all expenses and charges shall be fully met, and all just demands against my assets are discharged and paid,

and the money received (kept on interest when the amount is too small to meet a legacy) shall be divided and paid over to the proper persons authorized to receive the same, as follows: To the 'Fayette County Bible Society,' of which I acted as secretary for twenty years, three hundred dollars; to the sisters, Imogene and Henrietta Marr, both of Portland, Maine, three thousand dollars each, if both shall be living at the time when the money may be ready for distribution; if one should be dead the survivor shall be entitled to receive the share of the other; and to Elizabeth Pingree, also of Portland, Maine, three thousand dollars, and to Mrs. Eliza Watson, now of Cairo, in Illinois, one thousand dollars; and to the four daughters of Samuel McCurdy, all of Augusta, State of Arkansas, one thousand dollars each, if all shall be alive; if one or more be dead, the whole to go to the survivors in equal proportions.

"And all the rest, residue and remainder of my estate and effects, whether personal, real or mixed, whatsoever and wheresoever, not herein before otherwise effectually disposed of, I do give, devise and bequeath unto the Missionary Society of the 'Methodist Episcopal Church.'"

The following is an abstract of the decree rendered in this case, which is before us for review by writ of error.

It finds that McCurdy executed his last will June 1, 1874, and died September 29, 1876. That the will was probated November 30, 1876, by order of the County Court of Fayette County. That at the time of making his will, and at the time of his death, he owned four hundred shares of the capital stock of the National Bank of Vandalia, of the par value of \$100 per share. That in said will he provided that \$3,000 per annum should be paid from the dividend or earnings of said stock to Mary K. Marr during her life, and after her death the same to be paid to her daughters, so long as either of them might live. That after the full discharge of this burden two hundred of said shares should be transferred to McKendree College, and the remainder to the Board of Church Extension of the Methodist Episcopal Church. That testator named no executor or trustee to carry the said will

into effect. That on November 30, 1876, George W. Brown was, by the order of the County Court of Fayette County, Illinois, appointed administrator with the will annexed, and thereupon entered upon the discharge of his duties as such. That in pursuance of such duties he filed in the Circuit Court of Fayette County, February, 1877, his bill in chancery, making, among others, said McKendree College and said Board of Church Extension parties defendant; that said named defendants entered their appearance as defendants to said bill; that the court had jurisdiction of said defendants and of the subject-matter of said bill. That at said term a final decree was rendered, granting to said Brown authority to dispose of said bank stock for the uses and purposes in said will mentioned, and giving him "all the power, rights, duties and authority that an executor could have, if named and mentioned in said will." That said decree remains in full force. That said Brown at once undertook to administer the estate and carry into effect the provisions of the will. That said stock was then earning dividends and constituted two-fifths of the capital stock of said bank; that Brown received such dividends, and that said stock lawfully remained invested in said bank as long as said bank had an existence. That Brown had lawful right to represent said stock in the management of the bank's business, and to receive the dividends declared thereon. That co-stockholders were not intermeddlers with said fund, and received no part of the earnings of said four hundred shares, and were not co-trustees with Brown in the management of said trust. That said national bank ceased to exist April 2, 1883. That the intent of the testator was that said fund should be kept invested. That it was then Brown's duty to seek other investment, that in pursuance of that duty he, by title of George W. Brown, administrator with the will annexed of the estate of N. M. McCurdy, deceased, joined with all the other stockholders in the continuation of the business as a private bank. That said private bank had the same assets, was owned and controlled by the same persons as was the national bank, and

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was known as the "Bank of Vandalia," and continued business until the filing of the original bill in this cause. That Brown continued to represent said fund in the management of the business of the said private bank. That it earned and declared dividends, of which Brown received the full two-fifths. That Brown had lawful right to continue said fund in said private bank, and had lawful right to represent it in the management of the said banking business as continued, and to receive dividends declared. That the co-partners were not intermeddlers with said fund or in the management thereof, but were innocent co-investors, and not co-trustees. That McKendree College and the Board of Church Extension during the entire course of said business knew of said will, of Brown's appointment as administrator, of aforesaid decree, and that Brown had undertaken the management of said fund. That said McKendree College and said Board of Church Extension by decree of this court procured the appointment of John Penn, trustee, and said Penn is entitled to succeed Brown in the management of said fund. That by decree of this court said banking business and all its assets have been placed in the hands of a receiver. That said partnership has creditors, and such creditors have a prior right to be paid out of the assets of the partnership. That after the payment of the said indebtedness and the costs of the receivership, said Penn, trustee, will be entitled to the full two-fifths of all remaining assets. The court further finds that George W. Brown had lawful authority to manage said fund, to carry out the provisions of the will, until relieved by the death of all the annuitants, or by appointment by competent authority of his successor. That during the time said Brown had charge of said trust fund, said annuitants were living, and were entitled to receive the annuity. That he has properly accounted to the annuitants for all the income of said fund received by him, and under order of this court has turned over to the receiver appointed herein all the assets of said fund.

It is decreed that the receiver heretofore appointed by decree, proceed with due diligence to execute said decree.

That he shall pay first Lillie West \$963 and interest out of certain specified assets. That out of assets which are now or may hereafter come into his hands, he pay first the costs of the receivership, next pay the creditors of the firm in full. That after all such indebtedness is paid in full he shall deliver to John Penn, trustee, or his successor in trust, two-fifths of the remaining assets, and to each of the complainants in the original bill, except George W. Brown, their ratable proportion according to their respective interests as set out in their said bill. Ordered that the receiver pay in due course of administration all the costs of this proceeding." Complainant in cross-bill, John Penn, trustee, excepts.

FRED. B. MERRILL and ROBERT A. MOONEYHAM, attorneys for plaintiffs in error; G. A. KOERNER, of counsel.

Members of a joint stock company are liable as partners. Where there have been changes in the firm and the reorganized firm takes the assets and assumes the liabilities and continues the business, the new partners are liable for the debts, and those who were by the reorganization discharged need not be made parties defendant in a suit against the firm. *Wadsworth v. Duncan*, 164 Ill. 360; *Wadsworth v. Laurie*, 164 Ill. 42.

The equitable owner of a trust fund invested in such a partnership can not be deemed a partner where such investment is made without his knowledge, and the affairs of the firm managed without his participation. *Wadsworth v. Duncan*, 164 Ill. 360.

Where a trustee mixes a trust fund with his own private funds, as between him and the *cestui que trust*, the *cestui que trust* may follow the trust fund and claim every part of the blended property, unless the trustee can identify his own. *Halle v. National Park Bank*, 140 Ill. 413.

A trustee is liable for misconduct or breach of trust or negligence, as well as for money actually received. And if in these ways he injures the *cestui que trust* he is liable, whether he himself gains by his misconduct or not. *Taylor v. Benham*, 46 U. S. (5 How.) 275.

PATTON, HAMILTON & PATTON, attorneys for defendants in error.

The rule is that, as respects the management of personal property, and trusts in relation thereto, all the duties of an executor, which are cast on him by virtue of his office, devolve on the administrator with the will annexed, unless it necessarily appears from the will that such duties were cast upon the executor in personal trust and confidence by the testator. 1 Williams on Executors (7th Am. Ed.), 563, 564; Knight v. Loomis, 30 Me. 209; Woerner on Adm., Sections 178, 245; Blake v. Dexter, 12 Cush. 559; Buttrick Adm. v. King, 7 Met. 20; Farwell v. Jacobs, 4 Mass. 634; Hall v. Cushing, 9 Pick. 395; Dorr v. Wainwright, 13 Pick. 328; DePeyster v. Clendining, 8 Paige, 311.

Where the decree of such a court is relied on collaterally, jurisdiction must be presumed, although it fails to appear in the record. It appears to be unquestioned law that where the court has jurisdiction of the parties and the subject-matter in the particular case, its judgment, unless reversed or annulled in some proper proceeding, is not open to attack or impeachment by parties or privies in any collateral action or proceeding whatever. 1 Black on Judgments, Sec. 245; Freeman on Judgments, Sec. 330; Wells v. Mason, 4 Scam. 84; Iglehart v. Pitcher, 17 Ill. 308; Wallace v. Cox, 71 Ill. 549.

It is the duty of the trustee of a fund which is charged with the payment of annuities to keep the fund invested, and a court of equity will protect him if he does so. Welsh v. Belleville Bk., *supra*; 13 Am. & Eng. Ency. 202; Burnett v. Lester, 53 Ill. 325; Howe v. Earl of Dartmouth, 7 Vesey, 137.

Even without the decree appointing him trustee Brown's duty was to keep the fund invested. Carson v. Carson, 6 Allen, 397; Dorr v. Wainwright, 13 Pick. 328; Dole v. Johnson, 3 Allen, 364.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

This cause was heard by the chancellor in open court

upon oral and documentary testimony. His finding of facts should not then be disturbed unless clearly contrary to the weight of evidence. *Burgett v. Osborne*, 172 Ill. 227; *Maratta v. Anderson*, 172 Ill. 377.

The errors assigned, which are important to be considered, are, first, that the Circuit Court erred in refusing to decree an accounting by the defendants in the cross-bill of John Penn, trustee, for the trust fund mentioned in the cross-bill, together with lawful interest thereon; second, the Circuit Court erred in refusing to decree an accounting by George W. Brown, administrator with the will annexed of Nathaniel M. McCurdy, deceased, to John Penn, trustee, for the trust fund mentioned, together with lawful interest thereon.

Plaintiff in error urges two propositions for the consideration of this court :

1st. That George W. Brown had no authority to manage or invest the trust fund, meaning the 400 shares of bank stock.

2d. That if he had authority to manage or invest the fund, that it was so carelessly and improperly managed by said Brown and his associates, that this management, with their payment of unearned dividends, amounted to *devastavit* of the fund, and thereby renders them jointly and severally liable for it.

The consideration of the first proposition involves the construction of the will of McCurdy, and an examination of the decree of the Circuit Court of Fayette County rendered at its February term, A. D. 1877.

The will of McCurdy appears to have been drafted by himself, and with the intention to name executors in it, but none were named. In one place it states, "The \$3,000 (to the M. E. Church) shall be paid by my *executors* hereinafter to be named, as soon after my decease as they may be able to discharge all other bequests I make in this will, out of my dividends on my bank stock in the National Bank of Vandalia."

And in another place, "I also will and ordain that my

executors shall, on the best terms they can make and within a reasonable time after my death, sell all the property, real, personal and mixed, of which I may die seized, * * * and the money received kept on interest when the amount is too small to meet a legacy, shall be delivered and paid over to the proper persons authorized to receive the same, as follows," etc.

It is evident by these citations, that when drafting his will he intended that it should be administered by executors selected by himself.

It is also evident that the clause, "I also will and ordain that my executors shall * * * sell all the property, real, personal and mixed," must be considered and construed with the clauses referring to the bank stock. In other words, it was not his intention that his bank stock should be sold with his other personal property. He intended this to produce earnings to pay the Marrs' annuities as long as any one of them lived, and expected it to remain bank stock. The language of his will is: "The means to meet and discharge all the legacies in this will hitherto devised will be found in the earnings of my bank stock, *and when they are all fully discharged* I hereby will, bequeath and devise unto the proper government of McKendree College * * * to endow and support, and maintain and continue in use a professional chair, to be known as the McCurdy Professorship of the Pure and Applied Sciences, two hundred shares of one hundred dollars each, to be transferred on the books of the National Bank of Vandalia, to the credit of McKendree College, the earnings of which shall be appropriated to the salary of the Professor, etc. * * * The said stock shall be considered as a perpetual endowment, and no part thereof shall ever be diverted to any other use. * * * After the transfer of stock to the college or its authorized agent is made, and the college becomes its legal proprietor of that amount of capital stock, it, the college, will be entitled to a participancy in the management of the National Bank of Vandalia, and may continue so or sell out the stock, and invest elsewhere, * * * but as the con-

dition of things now is, I would advise that it be kept as stock in the bank, so long as the bank may hold an existence as such, and then seek other investment."

From these extracts from the will of McCurdy, his intention with reference to the bank stock is clearly seen. It is a cardinal rule of construction, that the intent of a testator must be given effect when it can be ascertained, and where the testator has not accurately or completely expressed his meaning by the words he has used, those words may be supplied from the context which will effectuate his intention. *Glover v. Condell*, 163 Ill. 584.

Supplying the words "except my bank stock," after the words "all my estate, real, personal and mixed," does effectuate the intention of the testator as gathered from the entire will.

No one having been named in the will as executor, it follows that no confidence was reposed in any particular person for its execution, which therefore devolved upon George W. Brown, as administrator *cum testamento annexo*.

At the February term, 1877, of the Fayette County Circuit Court, a decree was rendered in a proceeding in chancery, in which Brown was complainant, authorizing him to sell the real estate of the deceased, and granting, defining and affirming his powers, as follows:

"It is therefore further ordered, adjudged and decreed by the court, that said complainant, administrator of the estate of said McCurdy, transfer and dispose of said bank stock as in said will specified, and that it be so transferred and disposed of for the uses and purposes in said will mentioned, and that said administrator is hereby fully authorized and empowered to sell all of the other property of said Nathaniel M. McCurdy, deceased, including real estate, personal and mixed property, and to collect what is due said estate and to disburse the same as directed by said will.

"And it is further ordered, adjudged and decreed by the court, that said real, personal and mixed property may be sold, * * * and said complainant shall have generally all the powers, rights, duties and authority that an executor

could or might have, if named and mentioned in said will, and said administrator shall report all his actions and doings to the County Court of said Fayette County, as provided by law in reference to administrators.”

The decree of the chancellor finds that McKendree College and the Board of Church Extension of the M. E. Church were made parties defendant to this bill, and entered their appearance, and that the court had jurisdiction both of the subject-matter and of the parties. We see no valid reason for a different finding.

It is urged by the complainant that the decree rendered is not in accord with the bill filed. That the bill sought only authority to sell real estate. There is a conflict of testimony as to the scope of the bill. One of the counsel for complainant, who had the bill for examination, testifies that while in his possession he was ill with typhoid fever eight weeks, and after recovery was unable to find the bill. That the only relief sought by it was for power to sell real estate.

Brown, the complainant in the bill, testifies that “the proceeding was to construe the will, and determine my powers under it to conduct the business, including the bank stock.” In view of this conflict of evidence, we must presume that the decree is not broader than the bill, and was authorized by its allegations, prayer and the proofs offered. Every presumption is indulged to support the decree of a court of general jurisdiction. *Wenner v. Thornton*, 98 Ill. 156.

It is claimed, too, that it is in the nature of a consent decree, and for this reason is not conclusive.

The record shows that defendants were ruled to answer, and failing to plead, default was taken and decree *pro confesso*. Such a decree is a decree *in invitum*, and not a consent decree.

It is strongly urged, too, that the entry of appearance of the Board of Church Extension was improperly and fraudulently procured to be entered by complainant.

We have carefully examined the evidence upon this point

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and do not think it sustains the charge. In any case, the decree was a final decree, is still in force, and all parties acquiesced in it and acted under it without question, so far as this record discloses, from February, 1897, until attacked in this proceeding, a period of nearly twenty years. It is too late now for parties to the case to question its validity.

Under the decisions in this State, an administrator with the will annexed has no power to sell real estate without an order of court, although the will may have directed its sale by the executor. *Hall v. Irwin*, 7 Ill. 176; *Nicoll v. Scott*, 99 Ill. 537.

It is held in these cases that "executors may act in a double capacity: as executors by virtue of their office, and as agents or trustees under a warrant of attorney; * * * and it is only the powers and duties of the executor, as such, resulting from the nature of his office, which devolve upon an administrator with the will annexed, and not an authority as trustee," etc.

An examination of *Hall v. Irwin*, above cited, shows that the case is decided with reference solely to the authority of an administrator with the will annexed to sell real estate. The inference from the reasoning employed in the case, and from the authorities cited, is that the limitation of the authority of such administrator, as compared with the authority of an executor, applies only to real property. It may be said, too, that the case of *Conklin v. Edgerton's Adm.*, 21 Wendel, 423, cited in this opinion, has since been qualified in *Mott v. Ackerman*, 92 N. Y. 349.

We think that the weight of authority is, that, in the management of personal property and trusts in relation to the payment of legacies from personal property or its earnings, all the duties of an executor, which rest upon him by virtue of his office, devolve upon an administrator *testamento annexo*, unless it appears from the will that such duties were cast upon the executor by reason of personal trust and confidence.

This includes duties which are in the nature of a trust. *Woerner on Adm.*, Vol. I, Sec. 178; *Hall v. Cushing*, 9 Pick.

395; Leslie v. Moser, 163 Ill. 502; Blake v. Dexter, 12 Cush. 559; Knight v. Loomis, 30 Maine, 209; Farwell v. Jacobs, 4 Mass. 634; Mott v. Ackerman, 92 N. Y. 539.

"The office of such administrator differs little from that of an executor." Hood on Executors, 978.

But, without reference to these authorities, the decree of February, 1877, gives to Brown all the rights, powers and duties that he would have had if he had been appointed executor of the will of McCurdy. The legal effect of this decree was to construe the will; and to give the administrator *testamento anexo* power to sell real estate; and as incident to his duties as such administrator, to grant and affirm his authority to transfer and dispose of the bank stock for the uses and purposes mentioned in the will, and to exercise all the "powers, rights, duties and authority that an executor could or might have if named in said will." If the investment of the bank stock for the purpose of earning money to pay the Marrs annuities was in the nature of a trust, there is in this decree ample authority for Brown to invest and manage it as trustee.

It was evidently the intention of the testator that the fund represented by the bank stock should be kept invested, as its earnings were the only means provided for the payment of the annual legacy to the Marrs. It is also evident that it was his desire and intention that it should continue invested as bank stock in the National Bank of Vandalia until these legacies were discharged.

If Brown had been named as executor in the will it would have been his duty to collect the earnings of the bank stock and to apply them in the payment of these legacies as long as Mrs. Marr or either of her daughters lived, and at their death to transfer the stock as provided in the will. This would have carried with it the duty to keep invested the fund represented by the bank stock, after the surrender of the national bank's charter, so as to produce earnings; for the payment of the annual legacies was as sacred a trust as the final transfer of the fund producing these legacies, and the legacies could only be paid out of the earnings of the fund.

This view of the duties of Brown, as administrator with the will annexed, was doubtless the view taken by the court in its decree of February, 1877, and is the reason why he was ordered to report his doings from time to time to the County Court of said Fayette County, the tribunal which had jurisdiction over the administration of the estate. Where a "controversy arises over the construction of a will and the distribution of trust funds in the hands of an administrator with the will annexed, a proper disposition of the case will not take the estate out of the hands of the County Court; but when the will is construed, and the rights of the parties determined, the settlement of the estate can proceed in the County Court." *Minkler v. Simons*, 172 Ill. 326.

The first proposition, then, of complainant in the cross-bill, that George W. Brown had no authority to manage or invest the trust fund, is not sustained.

The four hundred shares of stock represented two-fifths of the capital stock of the National Bank of Vandalia. It had been a highly prosperous financial institution. The testator did not contemplate that any change would be made in the investment during the lifetime of his sister, Mary K. Marr, or of the daughters, or either of them. After their death it was to be transferred to McKendree College and to the Board of Church Extension. He advises in his will that when the two hundred shares were transferred to McKendree College, they should remain as stock in said bank, and be managed and controlled by the representatives of said college. At the time of McCurdy's death no one questioned the prosperous condition of the bank, nor does there appear to have been any reason for questioning it. It was not, then, careless or improper management by Brown to allow said stock to remain invested as the testator had invested it, and desired that it should remain invested.

When the bank surrendered its charter in 1883, it was done because the stockholders believed it to be to their profit to do so. Three-fifths of the stock was owned and controlled by stockholders whose personal interest was

involved. It is not to be presumed that they acted rashly, or inconsiderately, or knowingly against their own interest. If they can not be considered as so acting, why should Brown be so considered?

They were co-stockholders with Brown as administrator, not by their own volition, but as a result of the disposition of his stock by the former president of the bank. They could not compel Brown to sell or transfer the stock, nor did they control the two-thirds of the stock necessary under the federal statutes to force a surrender of the charter and a dissolution of the corporation. In no sense then can they, if acting honestly, so long as the National Bank of Vandalia continues in existence, be treated as co-trustees with Brown, or as intermeddlers with the stock represented by him.

When the National Bank of Vandalia ceased to do business on the first of April, 1883, the Bank of Vandalia immediately succeeded it. The assets, the capital, the former stockholders (now partners), the place of business, and inferentially the deposits and the customers, were the same. It was, in other words, the same bank, conducted as a partnership instead of a corporation. If it seemed prudent and advantageous to practical business men, owning three-fifths of the stock, to continue the bank as a private bank, there is no reason shown why it should not have seemed equally prudent and advantageous to Brown, controlling two-fifths of the stock. It was his duty to keep it invested. It was the advice of the testator "that it be kept as stock in the bank as long as the bank may hold an existence as such." The only change was from a national bank under certain management to a private bank under the same management.

We see, then, no reason why Brown, as administrator, or as trustee, should be charged with carelessness or mismanagement in continuing the investment in the Bank of Vandalia on April 2, 1883, which had been in the National Bank of Vandalia on April 1, 1883. It is true that the relation of those who had been co-stockholders with him in the first named bank, was now changed to that of partners

with him. It is also true that this new relation was of their own volition, while the former was not. They must have known, too, that the funds he brought into the partnership represented the stock he had controlled in the former bank, and must have known, too, for what uses and purposes it was held. It is in evidence also and not contradicted, that public notice was given of the investment.

George W. Brown testifies: "The national bank law compels national banks to give notice of liquidation. We gave that notice, and adjoining the same was notice of the organization of the Bank of Vandalia, giving the name of the stockholders. The notice stated that I had the McCurdy money in the new enterprise."

He also testifies: "I was elected a trustee of McKendree College, I think, at the annual conference in 1891. I attended the commencement at which the board of trustees have a session. I told them I had the McCurdy fund in stock of the Bank of Vandalia; that the national bank had surrendered its charter; that it was a private bank and the stock representing the \$40,000 was merged into the Bank of Vandalia, and that the income from it was being used to pay the annuities as provided by the will, and commissions and so forth. This is my best recollection as to the report I made them. I think that was in 1891. I know Rev. T. H. Herdman very well. He was a professor of the college, and I think its president for a short time. He was a member of its board of trustees. I think it was in 1885 Mr. Herdman came to Vandalia, from Lebanon, and inquired about the condition of the fund. I told him its condition and where it was invested."

Geo. W. Seaman testified that he was a trustee of McKendree College from 1856 to 1883. That he called the attention of the board to the McCurdy bequest in 1877, and that in 1883 he was "offensively persistent in demanding that they apply business sense to their own interests and take possession of this fund by "legal process if possible, and by force if necessary," but that his proposition was voted down. He also testifies to a correspondence with Dr.

Kynett, the secretary of the Board of Church Extension, "ten years ago," in reference to the fund. From this testimony it is clear that the *cestuis que trust* had knowledge of the funds bequeathed to them. It affords also, strong grounds for presumption that they, too, knew of the manner of its investment, and so knowing, virtually acquiesced and consented to it.

Brown also testifies that the stock (of the National Bank of Vandalia) did not pay ten per cent dividends all the time, but that it was making ten per cent at the time of the change, and that for a few years after the change, the Bank of Vandalia made ten per cent.

We think, then, that the findings of the chancellor, that McKendree College and the Board of Church Extension, during the entire course of said business, knew of said will, of Brown's appointment as administrator, of the decree of February, 1877, and that Brown had undertaken the management of the said fund, are warranted by the evidence; and that his conclusion that Brown had lawful authority to manage said fund and to carry out the provisions of the will, until relieved by the death of the annuitants, or by an authorized appointment of a successor, is correct in fact and in law. We think, too, that the evidence fails to show that, under the conditions as they appeared at the time, the continuance of the fund as an investment in the Bank of Vandalia, after the surrender of the charter of the national bank, was "carelessness and mismanagement." If, then, these conclusions are right, Brown's co-stockholders in the National Bank of Vandalia were neither intermeddlers nor co-trustees with him while the fund remained in the bank. If as administrator he had authority to invest the fund in the Bank of Vandalia, and there was nothing to indicate that it was not honestly and discreetly invested, his partners did not become intermeddlers or co-trustees with him in the management of the fund for the sole reason that it was so invested with their knowledge and privity. It is held even that the knowledge of one partner that a trust fund is misapplied does not make his co-partners liable. 1 Bates on Part., Sec. 481.

If, then, they did not become chargeable as co-trustees because of the investment, it is clear that they would not become chargeable because, in the vicissitudes of business, honestly conducted, the investment proved unprofitable.

If, in making the investment, Brown had been guilty of a breach of trust, and his partners had knowledge of the breach, a different question would be presented. In such case the authorities cited by plaintiff in error would apply, and all the partners having such knowledge would be chargeable as co-trustees.

It is claimed by plaintiff in error, in argument, that the partners of Brown in the Bank of Vandalia, having knowledge of the character of the fund invested by him and of the limitation of its use to produce earnings for the payment of the Marrs annuities, are chargeable with a *devastavit*, or loss of the fund, by reason of unearned dividends declared and paid out of the capital of the bank. This question is not before us for review. The theory of the cross-bill is that the fund was invested by Brown without authority, and that being so invested with the knowledge of his co-partners, they became co-trustees with him in its management, and are therefore liable for it. Upon this proposition the decree of the chancellor finds against plaintiff in error, and we affirm the finding.

The claim that in the management of the bank that its capital was diminished by the payment of unearned dividends, and that this fact was known to the partners managing its business, and that in consequence of this, they have made themselves liable for the fund, presents an issue of fact, that does not appear in the pleadings. All parties interested should have had an opportunity to meet and contest it if they so desired.

In a proceeding in chancery against guardians for an accounting, it is said in *Smith v. Smith*, 4 Johnson's Ch. Rep. 281:

"The only complaint against the guardians is, that they did not collect the money of the executor, who duly received it. But there is no such neglect charged in the bill, and

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they are not to be answerable for breaches of duty not charged in the bill. If it had been made a substantial allegation, they might, perhaps, have met and answered it fully and excused themselves completely from the charge of that neglect of duty."

A complainant is not permitted to make one case by his bill and another by his proof. *Coale v. Moline Plow Co.*, 134 Ill. 355.

It is claimed by plaintiff in error that the amount of the fund to the extent of \$40,000, invested in the Bank of Vandalia, should be a preferred claim against its assets. We see no reason, either in law or in equity, why innocent creditors of the Bank of Vandalia should be postponed in the payment of their claims until \$40,000 is paid to McKendree College and the Board of Church Extension. If Brown was authorized to invest this money as the court below found, and we affirm, it became subject, so far as the rights and equities of innocent parties are concerned, to the vicissitudes of business, the same as any other capital invested, and no lien exists, in law or equity, to protect capital invested as against creditors doing business with the investors.

The decree then correctly orders that the receiver pay the creditors of the Bank of Vandalia, before delivering two-fifths of the remaining assets to the trustee, John Penn, complainant in the cross-bill.

No accounting by Brown is prayed for in the cross-bill. Under the prayer for general relief this might be decreed, if it appeared from the evidence and the pleadings to be necessary for the adjustment of the equities involved. It does not so appear. The estate is still unsettled, and under the decree of the Circuit Court of Fayette County of February term, 1877, before cited, including the trust fund claimed by complainant in the cross-bill, is in the County Court of said county for supervision and adjustment. This seems to be warranted by *Minkler v. Simms*, cited *supra*.

It appears also that a decree has been had in the Circuit Court of said county, appointing complainant in the cross-bill trustee of the fund in the place of Brown.

This involves a transfer of the fund from Brown to said trustee, and therefore an ascertainment, through an accounting by Brown, of the receipts and disbursements of his administration.

Perceiving no substantial error in the record, the decree of the Circuit Court is affirmed.

Mr. Justice CREIGHTON, having tried this case in the court below, took no part.

N. E. Roberts v. R. L. Patterson.

1. PRACTICE—*Withdrawing Erroneous Instructions*.—It is not error for the court to withdraw an instruction which should not have been given. If counsel offer an erroneous instruction, which the court through inadvertence gives, he has no right to complain when the court discovers its error and corrects its action by withdrawing the instruction.

Assumpsit, on a promissory note. Error to the Circuit Court of Wayne County: the Hon. SILAS Z. LANDES, Judge, presiding. Heard in this court at the August term, 1897. Affirmed. Opinion filed March 1, 1898.

CREIGHTON, KRAMER & KRAMER, attorneys for the plaintiff in error.

J. R. HOLT, attorney for defendant in error.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

Plaintiff in error claims a set-off against a promissory note for \$140.75, signed by him and payable to O. P. Patterson, and by him indorsed after maturity to defendant in error. The claim grows out of the following transaction:

N. E. Roberts, plaintiff in error, and O. P. Patterson, were joint owners of some timber, which they sold for \$600, taking in payment three promissory notes, one for \$100, one for \$200, and one for \$300. These notes were left in the custody of Roberts. Subsequently, upon the call of O. P. Patterson, he gave to Patterson the \$100 and \$200 notes, retaining the \$300 note. Patterson claims that

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at this time it was understood and agreed between him and Roberts that this was a division of the notes, he taking and owning the two notes, amounting to \$300, and Roberts retaining and owning the \$300 note. Roberts denies this and claims that Patterson took them for collection only, and that he still had a one-half interest in these two notes. Patterson collected the money by suit on the notes which he received. Roberts failed to collect the \$300 note. If there was no division of the notes, as claimed by Patterson, Roberts should have been allowed as an offset, one-half the money collected by Patterson. If there was a division, he was not entitled to the offset.

The evidence is conflicting. The case has been twice tried—once before a justice and then upon appeal. Both trials resulted in favor of defendant in error. Under this state of facts, unless there has been a material error, the verdict of the jury should not be set aside.

Plaintiff in error contends in his brief that the court erred in refusing to admit certain memoranda on the stubs in the note book, of the notes delivered to Patterson, made by him at the time he delivered them. When these memoranda were offered in evidence, counsel for defendant in error objected. The court met the objection, saying: "I think the objection is properly taken, unless it was written in the presence of Mr. Patterson and he saw what was written there."

This was a proper ruling, and notified plaintiff in error what must be shown to entitle the memoranda to be used as evidence. He was then asked: "Was Patterson in your presence at the time it was done?" He answered: "He was within five or six feet of me, sitting down." This failed to meet the requirement stated by the court, and the memoranda were therefore properly refused. It is assigned for error that the court, after having given an instruction to the jury, recalled them into court and withdrew the instruction. The instruction is as follows:

"The court instructs the jury that before you will be authorized in finding that O. P. Patterson and N. E. Roberts had entered into a contract to divide certain joint

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notes owned by them, you must believe from the evidence that the minds of the said Patterson and Roberts came together and agreed to said division understandingly. It is not sufficient in this case to make a proposition, or to come and ask for a portion of the notes and collect them, unless there has been proof introduced satisfying you that a contract was entered into between said parties, whereby Patterson should have a right to collect and retain the two notes turned over to him."

This instruction does not state the law correctly. It was not necessary that the jury should be "satisfied" that the contract had been made. It required too strong a degree of proof. *Stratton v. Coal City Horse R. R. Co.*, 95 Ill. 25.

Nor was it error for the court to withdraw an instruction which should not have been given. If counsel offer an erroneous instruction, which the court through inadvertence gives, they have no right to complain when the court discovers its error and corrects its action by withdrawing the instruction. Judgment affirmed.

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The Carlyle Canning Co. v. The Baltimore & O. S. W. Ry. Co.

1. VERDICTS—*When They Become Effectual—Interference with the Jury.*—A paper signed by the jury and delivered to the officer, although opened, read and left with the clerk, is not a verdict before its delivery and acceptance by the court as such. Until so accepted, it is subject to change by the jury. Even after delivery and announcement, the jury may be polled, and if any juror dissents from the verdict as announced it ceases to be a verdict, and the jury retires for further consultation. Any interference with a jury before its verdict is rendered that secures a change in the verdict, or that hampers the free exercise of the will or the judgment of the jurors, as by securing and holding their affidavits, to be presented in court if advantageous to the party holding them to do so, is an improper interference that vitiates a verdict rendered in favor of the party so interfering.

2. JURY—*Improper Interference with—Nature of Conversation with, Immaterial.*—Whatever the nature of a conversation by an attorney for a party with the jury may have been, if in reference to the case after it

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is submitted and before verdict, it is not material; it is sufficient that it took place, and it amounts to such misbehavior, both on the part of the counsel and the jury, as to vitiate the verdict. Trials by jury would be of little worth were parties or their own attorneys permitted to interfere in any manner with the jurors after a case is submitted to them and they are considering their verdict.

8. *SAME—Communications by the Judge.*—No communication whatever ought to take place between the judge and the jury after the cause has been committed to them by the charge of the judge unless in open court, in presence of the counsel in the case.

4. *SAME—Communications by Attorneys.*—A communication by an attorney that secures affidavits as to the extent of a verdict in favor of his client, before it is returned into court, which makes it applicable to two cases, when, by its indefinite form, it is not applicable to any case, is such an interference as to entitle the defeated parties to a new trial.

5. *SAME—Remarks by the Judge.*—Remarks by the judge in the nature of statements to counsel of the views of the court that would control in the trial of the case, if the law as stated is afterward embodied in written instructions and given to the jury, the error, if any, is cured.

Action on the Case, to recover damages for the destruction of property by fire. Trial in the Circuit Court of Clinton County; the Hon. ALONZO S. WILDERMAN, Judge, presiding. Verdict and judgment for defendant. Error by plaintiff. Heard in this court at the February term, 1898. Reversed and remanded. Opinion filed August 31, 1898.

R. W. BARGKE and M. P. MURRAY, attorneys for plaintiff in error.

PALMER, SHUTT, HAMILL & LESTER and VAN HOOREBEKE & LOUDEN, attorneys for defendant in error.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

This case is here by writ of error to the Circuit Court of Clinton County, to review a judgment in favor of defendant in error, wherein the Carlyle Canning Company was plaintiff, and the Baltimore & Ohio Southwestern Railway Company was defendant. The action was in case, to recover damages for the destruction by fire of certain property owned by the Carlyle Canning Company, in a building owned by William Hallerman et al. Hallerman et al. also brought suit against the same company to recover for

the burning of the building. The cases were tried together before one jury, and judgments were rendered in favor of defendant for costs in each case. Writs of error were sued out to review these judgments, and both cases are pending in this court on records substantially alike. The declarations allege that the defendant operated a railroad along and adjacent to the property in question, and that, on the 28th of April, 1896, the defendant negligently set fire to the building and property in question, by means of which the same were destroyed and wholly lost to the plaintiffs, without fault or negligence on their part.

The second count sets out the duty of the defendant to use the best and most approved appliances to prevent the escape of fire, and alleges a failure in that regard, and that by means of such failure and negligence of the defendant in the operation of a certain locomotive engine along its line of railway, fire was permitted to escape from said engine and communicate to the property of plaintiff, whereby the same was consumed and wholly destroyed without the fault of plaintiff.

Plea of general issue in each case.

Errors are assigned in the usual form, charging the admission of improper and the exclusion of proper evidence, the giving, refusing and modifying instructions, and in overruling motion for a new trial, and motion in arrest of judgment.

The following additional errors are assigned :

12th. The court erred in allowing counsel for the defendant, against the objection of the plaintiff, to insist to the jury, as a defense, that the property had been insured and the plaintiff had received its value.

13th. The court erred in not instructing the jury, as requested, that the suit was properly brought in the names of the plaintiffs and not giving first, second and third instructions.

15th. The court erred in not granting a new trial for the reason that the attorney for the defendant intermeddled with the jury.

16th. The court erred in receiving the oral verdict in

open court after the jurors had conferred with defendant's counsel respecting it.

18th. The court erred in instructing the jury orally.

19th. The court erred in entering judgment in manner and form as aforesaid.

As this case will have to be reversed and remanded, no review of the evidence will be made, and no opinion expressed upon it.

In his opening statement counsel for plaintiff told the jury that "the property which was claimed to have been burnt by the defendant had been insured, and that the insurance company or companies had paid an amount of money on account of the loss, stating the amount, but that this fact could make no difference with the plaintiff's right to recover." He also stated, that "if plaintiff proved that fire was communicated to the building in which the plaintiff's personal property was situated by a locomotive engine of the defendant, and that such property was destroyed by that fire, then the plaintiff was entitled to recover the value of that property."

Counsel for defendant, in his opening statement, told the jury that "the defendant would insist that as the property had been insured and the insurance money paid, the plaintiff could not recover."

While this was an erroneous statement of the law, and should not have been made, the record fails to show any exception taken to it.

Counsel for defendant, proceeding, said that "the defendant would prove that the locomotive which was claimed had sent out the fire was, at the time of the fire, equipped with the best known appliances to prevent the escape of fire; that it was in good repair and that it was then in charge of a careful and competent engineer; and that if it proved these things the plaintiff could not recover." Whereupon the judge, addressing counsel, in the presence of the jury, said, "Gentlemen, your statements of the law are, I think, neither of them quite accurate;" and then proceeded to state the law as the court understood it applicable to cases where fire is communicated by locomotive

engines. To this statement by the court plaintiff in error excepted and claims that it was in effect an oral instruction to the jury, and assigns it as error for that reason.

What was said by the judge was in the nature of a statement to counsel of the views of the court that would control in the trial of the case. The law as stated was afterward embodied in written instructions and given to the jury. The assignment of this action of the court as error is not therefore sustained.

A question involving both cases is presented, arising out of the form of verdict as originally agreed upon by the jury and returned in writing, and the alleged improper conduct of counsel for defendant in error in communicating with the jury before the return of the verdict into court, and in procuring affidavits from jurors as to what they intended by their verdict.

The jury was instructed as to forms of verdict as follows:

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In this case if you find for the plaintiff, the form of your verdict may be as follows: We, the jury, find the defendant guilty, and assess plaintiff's damages at (here insert amount as you find it).

If you find for the defendant, say: We, the jury, find the defendant not guilty.

A similar form of verdict was given to be used in the case of Hallerman et al. v. defendant in error.

After being instructed on Saturday, November 21, 1896, the jurors were told by the court that when they had agreed upon verdicts, they should sign and deliver them to their officer, and that the officer would deliver them to the clerk, and that the jury should disperse and return to meet the court on Monday, December 14, 1896. Thereupon the court adjourned from Saturday, November 21, 1896, to Monday, December 14, 1896. The jury retired to consider their verdict and dispersed the next day, having left a sealed envelope with the officer, which envelope the officer delivered to the clerk. By consent of parties, and with the approval of the

judge by telegram, the clerk opened the envelope and it was found to contain only a paper in words and letters as follows:

STATE OF ILLINOIS, CLINTON COUNTY.

CARLYLE, November 21, 1896.

"We, the jury, find the defendant not guilty. (Signed by jurors.)

The clerk indorsed said paper, filed November 23, 1896.

On the 7th of December one of the counsel for defendant in error, in the absence of the court, and of any one representing plaintiffs in error, saw two of the jurors and asked them if they would be willing to make an affidavit that they intended their verdict to apply to both cases, and upon being answered that they were, he prepared and obtained from them such affidavit to the effect that the jury "found a verdict in favor of the defendant; that through inadvertence but one verdict was signed by the jury and delivered to the officer; that the jury in said cases understood and intended said verdict to apply in both cases." On the 14th of December a similar affidavit was obtained by the same counsel from the other ten jurors. Counsel who secured these affidavits, states in reference to their procurement, "that affiant asked the jurors if they would be willing to make affidavit that they intended their verdict to apply in both cases, and they answered they would, and that they thereupon made the affidavits hereto attached. That is all the conference affiant had with said jurors or any of them."

On the 14th of December, after said affidavits had been made, the jury returned their verdict into court as originally signed, and being asked by the judge if they intended it to apply to both cases, they answered that they did. The jury was then polled and adhered to their verdict as given in answer to the question of the judge. Then, over the objection of plaintiffs in error, the court entered a verdict of not guilty in each case.

The paper signed by the jury and delivered to the officer, although opened, read and filed by the clerk, was not a ver-

dict before its delivery and acceptance by the court as a verdict. Until so accepted, it should not have been filed and it was subject to change by the jury. Even after delivery and announcement, the jury may be polled, and if any juror dissents from the verdict as announced it ceases to be a verdict, and the jury retires for further consultation. Plaintiffs in error do not deny that a verdict may be orally rendered; nor do they deny the right of a judge to put a verdict in form; or to direct a jury to pass upon some issue that has been overlooked; or to complete an incomplete verdict; but they claim that any interference with a jury before its verdict is rendered that secures a change in the verdict, or that hampers the free exercise of the will or the judgment of the jurors by securing and holding their affidavits, to be presented in court if advantageous to the party holding them to do so, is an improper interference that vitiates a verdict rendered in favor of the party so interfering. They claim that in this case the verdict delivered in court can not stand. Not because it was orally rendered, nor because, in reply to the interrogatory of the judge, it was made to apply to both cases. But because the jury had been communicated with by counsel for defendant in error, and procured to make affidavits as to what their verdict was intended to be, and would be, thus hampering the free will and judgment of the jurors while the decision of the case was yet in their hands.

The facts with reference to the conference with the jury and the affidavits procured by counsel for defendant in error from the jurors, together with the examination of said counsel under oath, were heard by the court on a motion for new trial. As the verdict stood when the affidavits were made, it was incomplete and could not for uncertainty have been entered in either case. In order to complete it, the intelligent, uninfluenced exercise of the judgment of the jurors was yet required. Any word or act of any party that tended to prevent such free exercise was improper and a contempt of court.

By the affidavits secured by conference of counsel with the jury, in the absence of plaintiff in error and of the court,

the jury became committed under oath to a verdict of not guilty in each case. When polled, as they afterward were, the free decision of each juror was, or may have been, hindered by his affidavit previously made and in the possession of counsel for defendant in error. This was an interference with jurors before rendering verdict, such as courts can not tolerate. We say this without any intimation that improper influences were brought to bear upon jurors, or that their finding when questioned by the court would have been different if there had been no conference of counsel with them.

"In the trial of a case the appearance of evil should be as much avoided as evil itself." *Bradbury v. Cony*, 62 Maine, 223.

"Every one ought to know that for any, even the least, intermeddling with jurors, a verdict will always be set aside." *Knight v. Freeport*, 13 Mass. 218; approved in *Lyons v. Lawrence*, 12 Ill. App. 533.

"Whatever the nature of the conversation may have been is not material; it is sufficient it was had, and it amounts to such misbehavior, both on the part of the counsel and the jury, as to vitiate the verdict. Trials by jury would be of little worth were parties or their attorneys permitted to interfere in any manner with the jurors after a case is committed to them and they are considering their verdict." *Marten v. Morelock*, 32 Ill. 488.

If it is said that in the case at bar the jury had considered and agreed upon a verdict, it is a sufficient reply that the verdict as agreed upon was not satisfactory to defendant in error, and the conference with the jurors and the affidavits obtained from them were for the purpose of securing it in a shape that would be satisfactory.

The effect of communicating privily with a jury by a judge is stated in *Sargent v. Roberts*, 1 Pick. 337, as follows:

"As it is impossible, we think, to complain of the substance of the communication, the only question is whether any communication at all is proper, and if it was not, the party against whom the verdict was rendered is entitled to a new trial. And we are all of the opinion, after consider-

ing the question maturely, that no communication whatever ought to take place between the judge and the jury after the cause has been committed to them by the charge of the judge unless in open court, in presence of the counsel in the case."

If a communication by a judge, when the substance of the communication can not be complained of, entitles the party against whom a verdict is rendered to a new trial, certainly a communication by an attorney that secures affidavits as to the extent of a verdict in favor of his client, before it is returned into court, which make it applicable to two cases, when by its indefinite form it is not applicable to any case, is such an interference as to entitle the defeated parties to a new trial.

In view of the position taken by the defendant in error, that if plaintiffs in error had recovered insurance, they could not recover damages from the railroad company, it was error to admit evidence of the amounts of insurance collected. It could only be proper if the defense had been that plaintiffs in error had burned the property, and this was not claimed in defense.

We think, too, in view of the same position referred to above, that instructions one, two and three asked by plaintiff in error should have been given.

For the reasons above stated, the judgment is reversed and the case remanded.

William H. Hallermann, Guy C. Barkley and Fred Feulner v. The Baltimore & Ohio South-Western Railway Co.

1. **OPINION IN FORMER CASE—Adopted.**—The opinion of the court in *Carlyle Canning Co. v. The Baltimore & Ohio Southwestern Railway Company*, *supra*, is adopted as the opinion in this case.

Error, to the Circuit Court of Clinton County; the Hon. ALONZO S. WILDERMAN, Judge, presiding. Heard in this court at the February term, 1898. Reversed and remanded. Opinion filed August 31, 1898.

Rabbermann v. Pierce.

R. W. BAERGER and M. P. MURRAY, attorneys for plaintiffs in error.

PALMER, SHUTT, HAMILL & LESTER and VAN HOOREBEKE & LOUDEN, attorneys for defendant in error.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

This case was tried in the Circuit Court by agreement with the case of the Carlyle Canning Co. v. The Baltimore & Ohio Southwestern Railway Company. The same questions are involved in both cases, and the records are substantially alike. The opinion of the court in the Carlyle Canning Co. v. The Baltimore & Ohio Southwestern Railway Company, *supra*, is adopted as the opinion in this case. Judgment reversed and case remanded.

Frederick Rabbermann v. R. B. F. Pierce, Receiver, Successor of S. B. Callaway, Receiver of Toledo, St. L. & K. C. R. R. Co.

1. **ATTORNEYS—Improper Conduct.**—In arguing a case before a jury an attorney said: "I know, gentlemen of the jury, that the plaintiff has no right to a verdict in this case. I state that Mr. Burton's client has no case." *Held*, such affirmations on the part of counsel should be avoided. They are not witnesses and should not assume that character; but these affirmations do not amount to reversible error in this case.

2. **SAME—Fees in Actions Against Railroad Companies.**—A party litigant is entitled to attorney fees only when a judgment for damages is recovered by him against a railroad company for killing stock.

3. **EVIDENCE—In Rebuttal, Largely Discretionary.**—The admission of evidence in rebuttal is largely discretionary with the court.

4. **RAILROADS—Killing Stock—Defective Fences.**—Where a fence was constructed for a railroad company, as a fence of the kind required by law, by a party suing, and through its faulty construction his stock gets upon the track through it and is killed, he ought not to recover damages caused by his own negligence or his own acts.

Action for Killing Stock.—Trial in the County Court of Madison County; the Hon. WILLIAM P. EARLY, Judge, presiding. Verdict and judgment for defendant. Appeal by plaintiff. Heard in this court at the February term, 1898. Affirmed. Opinion filed August 31, 1898.

HADLEY & BURTON, attorneys for appellant.

CHARLES A. SCHMETTAU, attorney for appellee; CLARENCE BROWN, of counsel.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

This case was commenced before a justice of the peace, where appellant obtained a judgment for \$37. Upon appeal to the County Court judgment was given for appellee. The case was then appealed to this court, where the judgment was reversed and the case remanded. 63 Ill. App. 154.

Upon a retrial in the County Court judgment was again given for appellee. It comes again before this court upon the usual assignment of error as to evidence and instructions, and an additional assignment that "counsel for appellee in his argument to the jury used improper language, and the court erred in failing to control counsel when requested to do so." The language referred to is as follows: "I know, gentlemen of the jury, that the plaintiff has no right to a verdict in this case. I state that Mr. Burton's client has no case."

Such affirmations on the part of counsel should be avoided. They are not witnesses and should not assume that character; but we do not think that in this case these affirmations amount to reversible error.

The suit is to recover from the railroad company for killing a hog valued at \$7, and a shoat valued at \$5; also for scorching the limbs of two apple trees overhanging appellee's right of way, and thereby injuring the trees. The amount involved is small and the litigation has been protracted and ought to end, unless there are substantial reasons for reversing the case. Two juries in the County Court have found for appellee. We can not say from the evidence in the case that their finding is wrong.

It is insisted that there is error in refusing testimony as to appellant's attorney fees in the Appellate Court at the previous trial. We think not. Appellant is only entitled to attorney fees when a judgment for damages is recovered

by him against the railroad company for killing stock. His judgment for costs upon reversal in this court was not a judgment for damages against the company for killing stock. That question was still left to be litigated.

It is insisted that the court erred in rejecting testimony offered in rebuttal in reference to the cutting off some dead limbs of the apple trees. The admission of evidence in rebuttal is largely discretionary with the court and we find no abuse of that discretion. All the instructions asked by appellant were given. They presented the law of the case as favorably for him as he was entitled to ask. Some of appellee's instructions are open to criticism, but they do not show substantial error when all in the case are considered together. The first instruction for appellee tells the jury that if the right of way was properly fenced, as required by law, along plaintiff's land, that he could recover no attorney fee. As there was no damages allowed by the jury there could be no attorney fee allowed. This instruction, if faulty, could not, then, have injured appellant. There is no error in the third instruction.

The fourth might be clearer, but it is not bad for the reason assigned by appellant. A *prima facie* case against a railroad company for killing stock on its right of way is not made by showing only that stock was there killed. If it is shown that stock was killed and that the fence was not such as is required by law, then a *prima facie* case is made. *R. R. I. & St. L. R. R. Co. v. Lynch*, 67 Ill. 149.

The seventh instruction refers to the original construction of the fence, and if it appears from the evidence that it was constructed by appellant for the railroad company, as a fence of the kind required by law, and through its faulty construction his stock got through it and was killed, he ought not to recover for damages caused by his own negligence or his own acts.

There is no error in the ninth instruction.

The question of damages to appellant's trees was fairly presented to the jury and found against appellant.

Upon a review of the whole case we think that the judgment should be affirmed, and it is affirmed.

The City of Anna v. Ruth H. Boren.

1. **OFFICERS—Presumption as to Their Competency.**—The law presumes that officers are competent to fill the positions they occupy, and if they are not, and in consequence thereof injury has resulted to any person to whom the municipality owes a duty, it must answer for such injury, and can not be heard to urge the incompetency of its officers and servants as an excuse for its dereliction.

2. **CITIES AND VILLAGES—Absolute Control of Streets.**—Cities and villages have absolute control of the streets within the corporate limits.

3. **SAME—Evidence of the Possession of Sidewalks.**—Evidence showing that a walk has been repaired by the city is sufficient to warrant the jury in finding that it was in possession of the city.

4. **SAME—Can Not Surrender Jurisdiction Over Streets.**—A city can not surrender its jurisdiction and control over its streets and walks to the rabble, and thus claim immunity from its neglect of duty.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Union County; the Hon. JOSEPH P. ROBARTS, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the February term, 1898. Affirmed. Opinion filed August 31, 1898.

Dodd & Rich, attorneys for plaintiff in error.

KARRAKER & LINGLE, attorneys for defendant in error.

MR. JUSTICE BIGELOW delivered the opinion of the court.

Ruth H. Boren, the defendant in error, sued the city of Anna, plaintiff in error, in an action on the case, for negligently allowing a sidewalk on Williams street of the city to be and remain out of repair and in a dangerous condition for travel, for a long time, whereby she, while passing over it, in the exercise of ordinary care, tripped on a loose plank and fell through a hole in the walk, about two feet, to the ground, and in consequence received a severe sprain of her ankle, which caused her to be laid up for a long period of time, suffering great pain and unable to walk, and she has never fully recovered from her injuries.

A verdict and judgment were rendered in her favor for

\$500 damages, and the city has brought the case here by writ of error, and assigns four reasons why the judgment should be reversed.

First: "That the whole evidence taken together does not show that the condition complained of in the sidewalk had existed long enough to charge the city with notice of the defect."

Second. "The evidence fails to show that the street upon which the alleged sidewalk is said to have been located is a public street, or that the sidewalk is a public sidewalk, and that the city had possession and control of it."

The third and fourth reasons are, the giving by the court, on its own motion, of an instruction to the jury; and the refusal to give an instruction asked by the city.

The defendant below offered no evidence, but rested its entire defense upon the theory that the plaintiff had failed to make a *prima facie* case, on which she could be entitled to a verdict, and yet it did not ask the court to instruct the jury to find for the defendant, but did ask, and the court gave, fourteen instructions covering every point in the case.

Besides the plaintiff, eight witnesses who knew the walk and traveled over it, and who were apparently intelligent, candid men and women, testified that at and before the time of the injury complained of it was in a dangerous and unsafe condition for travel, and the most of them testified as to the length of time it had been so, and a fair inference from their testimony is, that the walk had been in such condition for so long a time that they could scarcely remember the time when it had been otherwise.

In view of this evidence, which is wholly uncontradicted, if we were to hold the first contention of counsel for plaintiff in error to be correct, it would be in effect holding that the city officials were wholly incapable of learning anything as to their duties, and that would not help the matter in the least, for the law presumes that they were competent to fill the positions they occupied, and if they were not, and in consequence thereof injury has resulted to defendant in error, to whom the city owed a duty, it must answer for

such injury and can not be heard to urge the incompetency of its officers and servants as an excuse for its dereliction. The first reason given why the judgment should be reversed is entirely without merit.

The second reason urged is fallacious, since the evidence shows that the street on which the sidewalk was constructed was a public street of the city, and it must be presumed, in the absence of evidence to the contrary, that the city was in possession of it and built and maintained the sidewalk.

The city has absolute control of the streets within the corporate limits. *Carney v. Marseilles*, 136 Ill. 401.

Counsel for the city succeeded in showing, on cross-examination of some of plaintiff's witnesses, that the walk had been repaired, and this was sufficient to warrant the jury in finding that it was in possession of the city, if this were necessary. But we are not prepared to hold that if the sidewalk was not actually built by the city, but had been used by the public for many years, and was allowed to remain in a dangerous condition for travel, that the city would not be liable to a pedestrian, who, in the exercise of ordinary care, meets with a severe injury to his person, on account of its condition in passing over it. A city may not surrender its jurisdiction and control over its streets and walks to the rabble and thus claim immunity from its gross neglect of duty.

The instruction which the court gave to the jury, on its own motion, and of which complaint is made, is as follows:

"No. 10. If you find, from the evidence, that the sidewalk in question was on one of the public streets of the city of Anna, known as Williams street, then the averment in the declaration that the city was possessed of and owned and controlled the sidewalk in question is fully made out."

Whether the instruction might not have been erroneous had the ownership of the sidewalk been contested, we need not stop to consider; but since no contest was made about the ownership, or possession, being otherwise than in the city, where, *prima facie* at least, the law placed it, the instruction properly stated the law applicable to the evidence.

Watts v. Hoffman.

The substance of defendant's refused instruction is as follows:

"Before you find for the plaintiff, she must prove by the weight of the evidence that the city was in possession and had control of the said sidewalk at the time the injury was received."

The instruction was at least misleading and was therefore properly refused.

From the uncontroverted facts before the jury, it is impossible to see how the city was injured even if the court erred in giving the instruction complained of, and to which objection was made, as well as in refusing defendant's instruction asked, since the jury could not have done otherwise than they did do without violating their oaths.

Finding no error in the record, the judgment of the Circuit Court is affirmed.

W. W. Watts, Ex'r, etc., v. John P. Hoffman et al.

1. **STATUTE OF LIMITATIONS**—*When it Begins to Run on Notes, with Provision that on Default in the Payment of Interest, the Entire Debt Becomes Due.*—A provision in a note and mortgage that upon default in the payment of interest, the entire debt shall immediately become due and payable, is permissive only. It does not of itself cause the notes to mature, so as to start the running of the statute of limitations.

2. **EXECUTION**—*Error to Award Costs and Execution Against an Executor.*—On the dismissal of a bill against an executor, it is error to award execution against the executor for costs. A recovery against an administrator or executor should be adjudged to be paid in due course of administration.

Bill of Foreclosure.—Trial in the Circuit Court of Clay County; the Hon. EDMUND D. YOUNGBLOOD, Judge, presiding. Finding and decree for defendant on demurrer. Error by plaintiff. Heard in this court at the February term, 1898. Reversed and remanded. Opinion filed August 31, 1898.

W. W. WATTS, attorney *pro se*.

B. D. MUNROE, attorney for defendants in error.

MR. PRESIDING JUSTICE CREIGHTON delivered the opinion of the court.

This was a bill in chancery filed on the 26th day of February, 1895, in the Circuit Court of Clay County, to foreclose a mortgage given by John P. Hoffman and Maria Hoffman, two of defendants in error, to the testator of plaintiff in error, to secure five notes of date November 20, 1882, for \$230, each bearing eight per cent interest from date, to be paid one, two, three, four and five years, respectively, after date. Each note, except the one to be paid in one year after date, contained the following: "Interest payable yearly, and if interest is not paid when due, the whole of this note to fall due;" and the mortgage contained: "But it is expressly provided and agreed, that if default be made in the payment of the said five promissory notes or any part thereof, or the interest thereon, or any part thereof, at the time and in the manner above specified for the payment thereof, or in case of waste or non-payment of taxes or assessments on said premises, or of a breach of any of the covenants or agreements herein contained, then, and in such case, the whole of said principal sum and interest, secured by the said five promissory notes in this mortgage mentioned, shall thereupon, at the option of said mortgagee, * * * become immediately due and payable."

The bill averred that the makers had not paid the principal sum of said notes or the interest thereon or any part thereof. A demurrer was interposed, upon the ground that under the above averment and the terms of the notes set out in the bill, the whole debt matured at the end of the first year, so that the statute of limitations began to run; and that at the time of filing the bill, all right of action, as to all of said notes, was barred.

The trial court sustained the demurrer, dismissed the bill, and ordered execution to issue against executor for costs.

We are of opinion the learned chancellor erred in his disposition of the case. A provision in a note and mortgage

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that upon default in the payment of interest, the entire debt shall immediately become due and payable, is permissive only. It does not of itself cause the notes to mature, so as to start the running of the statute of limitations. *Nebraska City National Bank v. Nebraska City Gas Light & Coke Co.*, 4 McCrary's Reports 319; *Richardson v. Warner*, 28 Federal Reporter, 343.

Had it been proper to dismiss the bill, still it would be error to award execution against the executor for costs. A recovery against an administrator or executor, should be adjudged to be paid in due course of administration. *Welch, Adm'r, v. Wallace*, 3 Gil. 490; *Grangang v. Merkle*, 22 Ill. 249.

The order, decree and judgment of the Circuit Court are reversed and cause remanded.

James Hardesty, Adm'r, v. The Forest City Insurance Co.

1. *INSURANCE—Contracts of, How Construed.*—A contract of insurance drawn by the insurer, who makes his own terms, and imposes his own conditions, will not be tolerated as a snare to the assured, and if the words employed, of themselves, or in connection with other language used in the contract of insurance, or in reference to the subject-matter to which they relate, are susceptible of the interpretation given them by the assured, although in fact intended otherwise by the insurer, the policy will be construed to favor the assured.

2. *SAME—Construction of Policies of Insurance.*—If there is any doubt, in view of the general tenor of a policy of insurance, whether the words used are to be taken in an enlarged or restricted sense, all things being equal, that construction should be taken which is most beneficial to the assured.

3. *SAME—Change of Title by Death of the Insured.*—A policy of insurance containing the provision that "if any change takes place in the title, possession or interest of the assured in the property insured, the policy shall be void," has no application in law to a change of title caused by the death of the insured where the policy contains a clause to make good the loss to the executors and administrators of the deceased.

Assumpsit, on a fire insurance policy. Trial in the Circuit Court of Hamilton County; the Hon. ENOCH E. NEWLIN, Judge, presiding. Ver-

77	413
81	235

77	413
182	39

77	418
108	545

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dict and judgment for plaintiff. Appeal by defendant. Heard in this court at the February term, 1898. Affirmed. Opinion filed August 31, 1898.

WEBB & LANE, attorneys for appellant.

When a policy provides that in case of any sale, transfer or change of title in the property insured, such insurance shall be void, the death of the assured operates such a change of title as renders the policy invalid. 1 Wood on Insurance, 712, 750; Wait's Actions and Defenses, Vol. 4, page 53; Lappin v. Charter Oak Ins. Co., 58 Barb. (N. Y.) 325; Hine v. Receiver of Homestead Fire Ins. Co., 93 N. Y. 75; Sherwood v. Agricultural Ins. Co., 73 N. Y. 447; Wyman v. Wyman, 26 N. Y. 253; Ostrander on Fire Ins., pages 239, 240, 241; Barns v. Union Mut. Fire Ins. Co., 51 Me. 110; Morrison v. Tenn. Marine Ins. Co., 59 Am. Dec. 299; Dix et al. v. Mercantile Ins. Co., 22 Ill. 272.

In this contract of insurance the condition is plain and must be interpreted according to the intention of the parties, gathered from the language employed. Dix et al. v. Mercantile Ins. Co., 22 Ill. 272; Home M. F. Ins. Co. v. Hauslein, 60 Ill. 521.

A contract of insurance is one of indemnity, is purely personal, and does not run with the thing insured. 1 Wood on Insurance, page 695, Sec. 329; Finney v. Bedford Com. Ins. Co., 8 Met. (Mass.) 348; Arnold on Ins., Vol. 1, page 146 (Note); Phillips on Ins., Vol. 1, page 219; Duer on Ins., Vol. 2, Sec. 24; Ostrander on Ins., page 239, Sec. 77.

A. M. WILSON and STEELE, WALKER & CROSS, attorneys for appellee.

When the policy is issued to the assured, his executors, administrators or assigns, his personal representatives may maintain an action therein for the benefit of those having the title to the real estate under the will or by descent; thus if the owner of a dwelling house insured against fire dies, and a loss thereafter accrues during the life of the policy, those having title to the real estate are entitled to the proceeds thereof. Wood on Insurance, 713; Wyman v.

Wyman, 26 N. Y. 253; Burbank v. R. M. F. Ins. Co., 24 N. H. 550; Wood on Insurance (Banks Bros. Ed.), 237, Sec. 113.

MR. PRESIDING JUSTICE CREIGHTON delivered the opinion of the court.

This was an action of assumpsit, in the Circuit Court of Hamilton County, by appellee against appellant, to recover on a fire insurance policy, issued by appellant to appellee's intestate.

On the 21st day of January, 1892, appellant issued its policy of insurance to Henry Hardesty, insuring, for five years, a certain property, including two small dwelling houses; on the 16th day of April, 1894, Henry Hardesty died intestate; on the 24th day of April, 1894, appellee was appointed administrator of deceased assured's estate; on the 23th day of November, 1895, the two dwelling houses covered by the policy of insurance were totally destroyed by fire; and on the 11th day of May, 1896, appellee commenced this suit.

A declaration setting out the policy *in haec verba*, and setting up the facts quite fully, containing proper averments, was, in due time, filed by appellee. To this declaration appellant filed a general demurrer. The demurrer was overruled by the court. Appellant elected to stand by its demurrer. Default was adjudged and entered. Jury impaneled. Evidence heard. Verdict in favor of appellee for \$250. The court rendered judgment on the verdict against appellant.

It is insisted by appellant that the court erred in overruling its demurrer to appellee's declaration, and its counsel state their position as follows: "The grounds of demurrer and of the defense upon which we rely in this case, is that the death of Henry Hardesty * * * worked such change of title and of possession to the property insured as to make the policy of insurance absolutely void."

The language of so much of the policy as is involved in the issue raised is as follows: "And the said company

hereby agrees to make good unto the said assured, his executors, administrators and assigns, all such immediate loss or damage * * * as shall happen by fire * * * to the property * * * specified, from the 21st day of January, 1892, at noon, to the 21st day of January, 1897, at noon. * * * If the assured have or shall hereafter obtain any other insurance * * * on the property hereby insured, or any part thereof, without consent from the secretary of the company indorsed hereon; or if the above mentioned buildings or any part thereof shall be occupied or used, except as herein stated, or become vacant or unoccupied; or if the risk be increased by the erection of adjacent buildings, or by any other means whatever, without consent of the secretary of this company indorsed hereon; or if any incumbrance, by mortgage or otherwise, has been, or shall be executed thereon unless the same was fully stated in said application, or indorsed hereon by the secretary of the company; or if foreclosure proceedings shall be commenced; or if the assured fails to make known any fact material to the risk; or if any change takes place in the title, possession or interest of the assured in the above mentioned property; or if this policy shall be assigned without the consent of the secretary indorsed hereon; then in each and every such case, this policy shall be void."

In the interpretation of a contract, the purpose of the transaction between the parties must be rightly apprehended and the contract be so construed as to effect that purpose, if it be possible so to do, by giving to the language of the contract, as a whole, any reasonable meaning.

In Phillips on Insurance, at Sec. 124, it is said: "The predominant intention of the parties in a contract of insurance is indemnity, and this intention is to be kept in view and favored in putting a construction upon the policy."

In May on Insurance, Vol. 1, 3d Ed., at Sec. 174, it is said: "Having indemnity for its object, the contract is to be construed liberally to that end, and it is presumably the

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intention of the insurer that the insured shall understand that in case of loss he is to be protected to the full extent which any fair interpretation will give. * * * Conditions and provisos will be strictly construed against the insurers because they have for their object to limit the scope and defeat the purpose of the principal contract."

In Wood on Fire Insurance, at Sec. 59, it is said: "It is the duty of the insurer to clothe the contract in language so plain and clear that the insured can not be mistaken or misled. * * * Having the power to impose conditions, and being the party who draws the contract, he must see to it that all conditions are plain, easily understood, and free from ambiguity. * * * Failing to employ a clear and definite form of expression, the benefit of all doubts will be resolved in favor of the assured. The courts will not permit the assured to be misled or cheated where there is any sort of justification, from the language used, for the interpretation placed by him upon the instrument. A contract drawn by one party, who makes his own terms and imposes his own conditions, will not be tolerated as a snare to the unwary, and if the words employed, of themselves, or in connection with other language used in the instrument, or in reference to the subject-matter to which they relate, are susceptible of the interpretation given them by the assured, although in fact intended otherwise by the insurer, the policy will be construed to favor the assured."

In Vol. 1, 2d Ed., Wood, page 145: "If there is any doubt, in view of the general tenor of the instrument of writing, where the words used therein are to be taken in an enlarged or restricted sense, all things being equal, that construction should be taken which is most beneficial to the promisee. This rule of construction is especially applicable to the construction of policies of insurance."

The courts of this State have adopted and emphasized the above principles and rules for the interpretation and construction of insurance contracts. Commercial Ins. Co. v. Robinson, 64 Ill. 265; Phœnix Ins. Co. v. Tucker, 92 Ill. 64; Niagara Ins. Co. v. Scammon, 100 Ill. 644; Schroeder v.

Trade Ins. Co., 109 Ill. 157; Healey v. Mutual Accident Ass'n, 133 Ill. 556; Illinois Mut. Ins. Co. v. Hoffman, 31 Ill. App. 295; Detroit F. & M. Ins. Co. v. Chetlain, 61 Ill. App. 450.

It is also a general rule for the interpretation and construction of contracts, that "every clause and every word should, when possible, have assigned to it some meaning. It is not allowable to presume or to concede when avoidable that the parties in a solemn transaction have employed language idly." Hill v. Lowden, 33 Ill. App. 196; Bishop on Contracts, Secs. 384 and 579; Hennessy v. Gore, 35 Ill. App. 594; Hays v. O'Brien, 149 Ill. 403.

In construing the policy in this case the clause, "and the said company hereby agrees to make good unto the said assured, his executors, administrators, and assigns, all such immediate loss or damage as shall happen by fire to the property specified," must be considered in connection with the clause, "or if any change takes place in the title, possession, or interest of the assured in the above mentioned property, then * * * this policy shall be void;" and we must bear in mind that this contract must be so construed as to effect the predominant purpose of its making, if that can be done by giving the language, as a whole, any reasonable meaning; that the clause providing for indemnity must be liberally construed in favor of indemnity; that the clause providing for forfeiture must be strictly construed against forfeiture; that the words in the clause providing indemnity must be given the most enlarged meaning consistent with reason; and the words in the clause providing forfeiture, be given the most restricted meaning consistent with reason; and that, as the insurer drew the contract, the benefit of all doubts must be resolved in favor of the assured.

It is true that, upon the death of the assured, the title to the property covered by the insurance passed by the law of descent to his heirs, and that change of title did thereby take place; but does the contract, in meaning, necessarily include change of title by death and descent? Ought the

assured to have understood, at his peril, at the time he accepted the policy, that the clause "if any change takes place in the title, possession or interest of the assured in the above mentioned property, then this policy shall be void" had reference to his death and change of title by descent? ought he to have known that, by that clause, his own death would forfeit his policy?

Appellant's counsel cite many authorities touching the effect of change of title, but they all refer to cases where the change of title was by some form of conveyance executed by the assured or by judgment or decree of court, except *Wyman v. Wyman*, 26 N. Y. 253; *Sherwood v. Agricultural Ins. Co.*, 73 N. Y. 447; *Miller v. German Ins. Co.*, 54 Ill. 53; *Lappin v. Charter Oak Ins. Co.*, 58 Barb. (N. Y.) 325, and *Hine v. Receiver of Homestead Fire Ins. Co.*, 93 N. Y. 75.

In *Wyman v. Wyman* the change of title was as to the policy; the court in that case says: "The condition in the policy which is cited by appellants refers to assignments or transfers of the policy itself or of the interest of the assured therein, and not to transfers of the title to the building insured, or the land on which it stood."

In *Sherwood v. Agricultural Ins. Co.* and in *Miller v. German Ins. Co.* there were no provisions in either of the policies that the insurance companies should make good the loss to the "assured, his executors, administrators and assigns." Nothing anywhere to indicate an undertaking or liability to the executors and administrators of the assured. In *Miller v. German Ins. Co.* the court comments upon that feature of the case, emphasizes it, and makes the case turn on the absence of such provision.

Lappin v. Charter Oak Ins. Co. and *Hine v. Receiver of Homestead Fire Ins. Co.*, two New York cases, one decided in 1870 and the other in 1883, are upon facts so analogous to the case before us for determination as to make them of value in support of appellant's position, and are the only direct authority supporting that position. True, a few text writers announce the same proposition, but they refer to, and rely wholly upon, these two New York cases.

It appears to us that to sustain appellant's position, we must render the words "his executors and administrators," in the clause providing indemnity, nugatory. But counsel for appellant say we may hold with them and still give these words meaning; that these words mean, in case loss occurs in the lifetime of the assured, and payment be not made until after his death, then the insurance company shall pay his executor or administrator, and in such case, upon refusal to so pay, the executor or administrator may maintain suit.

Under the laws of this State all this would be true without the use of these words in the contract. To limit these words to that meaning would be "to presume that the parties in a solemn transaction have employed language idly;" would be to give to the words the most restricted meaning possible, when the law requires us to give them the most enlarged meaning consistent with reason. Counsel for appellant insists that if we give meaning to the clause, "If any change takes place in the title, possession, or interest of the assured in the above mentioned property," we must hold that the change of title incident to the death of the assured is within the meaning of that clause.

To so hold would be to give to the words of that clause the most extended meaning possible, when the law requires us to give to them the most restricted meaning consistent with reason. We may hold that the undertaking to make good the loss to assured's executors and administrators is a limitation upon the meaning of the words in the forfeiting clause and still give to those words and to that clause a large meaning, a meaning that shall include all imaginable changes of title, possession or interest, except only that one which contemplates the coming into existence of an executor or administrator. We may hold, that clause does not include change of title by death, and not render the clause nugatory, but leave it much meaning; leave it as much meaning as can reasonably be assumed to have been within the contemplation of any reasonable man under the same or similar circumstances, as was assumed at the time he accepted the policy sued on.

Hardesty v. Forest City Ins. Co.

In a comparatively recent English case, *Bailey v. De Crispigny*, L. R., 4 Queen's Bench, 185, the court says: "But where the event is of such a character that it can not be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be bound by general words which, though large enough to include, were not used (understood) in reference to the possibility of, the particular contingency which afterward happened."

When assured paid for his insurance for a definite term of five years, and accepted his policy containing the agreement to make good to him, his executors and administrators, all loss that should happen by fire to the property covered by the insurance, within the term of five years, and not a word in the policy concerning his death, is it reasonable to suppose that it was within his contemplation, or that he understood that in the case of his death during the term, his policy would thereby become void?

In *Georgia Home Ins. Co. v. Kinnier's Adm'r*, 28 Grattan's Reports (Va.) 88, the condition in the policy was: "And if the title of the property is transferred or changed, * * * the policy shall be void." In discussing that condition in the policy the court, at page 111 of the opinion, says: "Moreover it is to the last degree unreasonable to suppose that any sane man would accept a policy of insurance against loss by fire, if he understood it, which contained a provision for immediate forfeiture by reason of his death and consequent descent of title to his heirs."

In *Richardson's Adm'r v. German Ins. Co. of Freeport*, 89 Ky. 571, a recently decided case, all the provisions of the policy were the same, word for word, as the provisions of the policy in the case before us; the assured died before the loss occurred, and suit was brought by his administrator. The court says: "The single question presented is, whether the policy became void and of no effect upon and by reason of the death of the assured, which occurred before the destruction of the property."

The court in that case held that the insurance was for a specified term, that the agreement was to make good unto,

not merely the assured himself, but his executors and administrators as well, loss that might happen by fire to the property covered by the insurance, whether such loss occurred before or after the assured's death, and says, to treat the death of the assured as a termination of the policy and all liability under it, would be contrary to the express terms of the policy, and render the stipulation for payment to the personal representatives of the assured superfluous, and allow the company to retain the full consideration paid, while being held to only part performance of its agreement. "It is true, as argued, the property might have been destroyed before, though the loss is not made good until after his death; but the stipulation to pay his personal representatives was not necessary to meet such contingency, because the amount due could have, in such case, been collected without."

The "condition of forfeiture mentioned may, without destroying or lessening its proper meaning or effect, be reconciled with a continuation of the policy after such death to the end of the period, and it therefore should be done, rather than defeat what was elsewhere in the policy clearly provided for."

To our minds the conclusion reached by the New York courts is not well supported in sound reason, does violence to many of the established rules for the interpretation of insurance contracts, is fairly overborne by the weight of authority, and ought not to be adopted as the law in this State.

The judgment of the Circuit Court is affirmed.

John Field v. The People of the State of Illinois.

1. **EXCEPTIONS**—*Must be Preserved in the Bill of Exceptions.*—An exception to the judgment in the judgment order, but not preserved in the bill of exceptions, is the same as no exception at all.

Debt, for a statutory penalty. Trial in the Circuit Court of Pope County; the Hon. JOSEPH P. ROBERTS, Judge, presiding. Finding and

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judgment for plaintiff. Appeal by defendant. Heard in this court at the February term, 1898. Affirmed. Opinion filed August 31, 1898.

GEORGE B. LEONARD, attorney for appellant.

WM. H. MOORE, State's Attorney, for appellee.

MR. PRESIDING JUSTICE CREIGHTON delivered the opinion of the court.

This was an action commenced before a justice of the peace in Pope county, by the People of the State of Illinois, against appellant, as the keeper of a ferry on the Ohio river, at Golconda, to recover the penalty provided by the statute for failure to provide proper wharfs or landings. The cause was appealed to the Circuit Court and tried by the court without a jury, by agreement, resulting in a judgment against appellant for \$50.

Appellant brings the case to this court. The bill of exceptions is as follows:

"STATE OF ILLINOIS, }	In the Circuit Court.
Pope County. }	To the October term, 1897.

The People of the State of Illinois

v.

John Field.

Be it remembered that on the trial of this cause, the counsel for the people, to maintain and prove the issues on their part, gave in evidence the testimony of James Bird and Charles Compton and papers marked 'Exhibit A, B, C, D and E,' as shown in the within transcript of G. W. Ballece, court reporter; to which evidence the defendant objects as improper. The court being of the opinion that said evidence was proper, the defendant excepted to such opinion, and prayed that his exceptions might be signed, sealed and made a part of the record pursuant to the act of the legislature in such case made and provided, and it was accordingly done this 17th day of November, 1897.

[SEAL]

JOSEPH P. ROBERTS,
Judge."

The only exception preserved in the bill of exceptions is to the admission by the court of the testimony of two witnesses and of certain papers.

Appellant's counsel fails to point out wherein this evidence is improper, and after a careful examination of it, we fail to find any substantial reason why it should not have been admitted over a mere general objection.

It is contended that the evidence does not support the findings of the court. We are inclined to the same conclusions, from the evidence, reached by the trial court; but if it were not so—no exception to the findings and judgment of the court are preserved. It is suggested that an exception was noted and appears in the judgment below.

"An exception to the judgment in the judgment order, but not preserved in the bill of exceptions, is the same as no exception at all." *Mitchell v. Mackey-Nisbit*, 69 Ill. App. 186.

The judgment of the Circuit Court is affirmed.

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**Charles F. Ross, Receiver of the Western M. Mutual Ins.
Co. v. The Knapp, Stout & Co. Company.**

1. *DEMURRER—To the Common Counts.*—It is error to sustain a demurrer to the common counts, and for such error the judgment must be reversed.

2. *STOCKHOLDER—The Term Defined.*—A stockholder is one who is the holder or proprietor of stock in the public funds, or in the funds of a bank or other stock company. To be a stockholder of an incorporated company, is to be possessed of the evidence that the holder is the real owner of a certain undivided portion of the property, in actual or potential existence, held by the company in its name, as a unit, for the common benefit of all the owners of the entire capital stock of the company.

3. *CORPORATIONS—Trustees of the Stockholders.*—A corporation is a trustee for the stockholders, whose interest it is its duty to guard. The stockholders have nothing to do with the property itself, except to select persons to manage and control it.

4. *MUTUAL INSURANCE COMPANIES—When Policy Holders Are Not Necessary Parties—Assessments.*—The policy holders of a mutual

Ross v. Knapp, Stout & Co. Company.

insurance company are bound by the proceedings of a court of equity appointing a receiver and assessing them, although they are not personally made parties to the proceedings, and have had their day in court.

5. *THE SUPERIOR COURT OF COOK COUNTY.*—*A Court of Superior General Jurisdiction.*—The Superior Court of Cook County is a court of superior general jurisdiction, and its proceedings can not be attacked collaterally except for the want of jurisdiction.

6. *STATUTES—Section 25 of the Act Concerning Corporations Does Not Apply to Mutual Fire Insurance Companies.*—Section 25 of the act entitled, "An Act Concerning Corporations," approved April 18, 1872, and in force July 1, 1872, does not apply to mutual fire insurance companies organized under the laws of this State.

Assumpsit, for assessments upon members of an insurance company. Trial in the Circuit Court of East St. Louis; the Hon. BENJAMIN H. CANBY, Judge, presiding. Judgment for defendant on demurrer to declaration. Error by plaintiff. Heard in this court at the February term, 1898. Reversed and remanded. Opinion filed August 31, 1898.

STATEMENT.

The Northwestern German Mutual Fire Insurance Company, of North Chicago, was incorporated under a special act of the legislature of this State, approved March 30, 1869, which was expressly declared to be a public act, and took effect from and after its passage. (Private Laws of 1869, Vol. 2, 552.) Some time thereafter (but when or by what means is uncertain) its name became changed to "Western Manufacturers Mutual Insurance Company."

Section 2 of the charter is as follows: 2. "All persons who shall at any time be insured in this company, shall be members thereof during the continuance in fact of their respective policies, and no longer, and shall at all times be bound by the provisions of this act, and the by-laws and the regulations of said company."

Section 5 of the charter provides: "Premium notes may be received from the insured, which shall be paid at such time or times, and in such sum or sums, as the directors shall require for the payment of losses and expenses."

Sections 6 and 7 of the charter are as follows:

6. "The directors of said company may levy an assessment upon the premium notes of policy holders at any time

they may deem it necessary, for the payment of losses and expenses that may arise."

7. "The members of this company shall be and are, bound to pay their share, in proportion to their amount of insurance, for all losses and expenses happening and accruing during the time for which their policies were issued, to the amount of their premium notes."

During the period commencing May 21, 1894, and ending May 21, 1895, the insurance company issued to defendant in error five policies, each containing a clause as follows: "The insured heretofore named, by accepting this policy, thereby becomes a member of this company, and agrees to pay it, in addition to the premium, such sum or sums, in no event to exceed in the aggregate three times the amount of said premium, at such time or times, in such manner and by such installments, as the directors of this company shall assess and order, pursuant to its charter and by-laws and the laws of the State of Illinois."

Myron H. Beach recovered a judgment against the company in the Superior Court of Cook County, and on the 30th day of December, 1895, he filed a creditor's bill in the same court, on behalf of himself and all the other creditors of the company, making the company only, a defendant thereto, and on the same date plaintiff in error was duly appointed receiver of said company, and on the following day he qualified and entered upon the duties of his office, and afterward filed an inventory of the assets and liabilities of the company, with a petition, showing the necessity for making an assessment upon the members of the company of the sum of \$72,000, to pay its liabilities.

Upon a hearing, the court found the total membership liability to the company on the policies issued to them, to be \$86,666.84, and that these liabilities constituted the entire available assets of the company; and the court directed the receiver to make an assessment, as prayed for in the petition, which was done, and the assessment was approved, and the receiver directed to notify the individual members of their respective assessments, and to make a demand there-

for, and to proceed and collect the amount assessed against each.

The aggregate amount assessed against defendant in error was \$1,332.60 on its five policies and premium notes, to recover which this action was brought.

C. W. GREENFIELD, attorney for plaintiff in error.

The court will take judicial notice of a special charter of a corporation, which, by its terms, is made a public act. *People ex rel. v. Hydraulic Co.*, 115 Ill. 281, 288.

The expression of one thing or one mode of action is an exclusion of all other things or modes. *Gaddis v. Richland Co.*, 92 Ill. 119, 124.

Section 25 of the general incorporation act does not apply to corporations organized under special charter prior to the passage of that act. *Wincock v. Turpin*, 96 Ill. 135, 144; *Union Ins. Co. v. Stone Mfg. Co.*, 97 Ill. 537, 545; *Stevens v. Pratt*, 101 Ill. 206, 219.

An assessment made by decree of court in a case to which the corporation is made party defendant and brought into court, can not be collaterally attacked. *Lycoming F. I. Co. v. Langley*, 62 Md. 211; *Hawkins v. Glen*, 131 U. S. 319; *Rand, McN. & Co. v. Mut. F. I. Co.*, 58 Ill. App. 528; *Parker, Receiver, v. Stoughton Mill Co.*, 64 N. W. Rep. 751; *Great Western Telegraph Co. v. Purdy*, 162 U. S. 329; *Parker, Receiver, v. Central Ohio Paper Co.*, 3 Ohio Legal News, 205; *In re Commercial Ins. Co.*, 36 Atl. Rep. 930; *Langworthy, Rec., v. Nelson Lbr. Co.*, Vol. 14 Nat. Corp. Rep. 212; *Mutual Fire Insurance Company v. Phoenix Fur. Co.*, 66 N. W. Rep. 1095; *Thompson Lumber Co. v. Mutual Fire Insurance Company*, 66 Ill. App. 254; *Mallen v. Langworthy, Receiver*, 70 Ill. App. 376; *Morris v. Insurance Company*, 63 Minn. 420; *Taylor v. North Star Insurance Company*, 46 Minn. 198; *Cap. City M. F. I. Co. v. Boggs*, 33 Atl. Rep. 349; *Eichman v. Hersker*, 33 Atl. Rep. 229; *Great Western Telegraph Co. v. Gray*, 122 Ill. 630; *Ward v. Farwell*, 97 Ill. 593; *Glenn v. Liggett*, 135 U. S. 533; *Sanger v. Upton*, 91 U. S. 56; *Smith v. Hopkins*, 38 Pac. Rep. 854.

A general demurrer to declaration containing common counts must be overruled. *Barber v. Whitney*, 29 Ill. 439.

WISE & McNULTY, attorneys for defendant in error.

The charter of this company was granted on the 30th day of March, 1869. It was then named the Northwestern German Mutual Fire Insurance Company. The declaration avers that its name was afterward changed to the Western Manufacturers' Mutual Insurance Company. The declaration does not allege the date. We know the present Constitution was adopted in 1870, and no session of the legislature was held after the charter was granted until after the present constitution became the fundamental law of the land, and under it no private act could be obtained to change the name; consequently, in order to have made the change of name, it must have been done under the general incorporation act as amended in March, 1872, or as it was subsequently amended. By so doing did it make itself amenable to the provision of the general incorporation act, of which that was only a part? It was so held where an insurance company, created by special charter, increased its capital stock under the general law. *Tibballs v. Libby*, 87 Ill. 142.

A member of a mutual insurance company occupies, so far as his liability is concerned, a position similar to a stockholder in a stock company, except that his liabilities will continue as long as a member, while in most companies the stockholder's liability ceases upon the payment of his stock. In order to make a valid assessment against the stockholder, under section 25 of the incorporation act, he must be made a party to the proceeding. *Chandler v. Brown*, 77 Ill. 333; *Chandler v. Dore*, 84 Ill. 275; *Chestnut v. Pennell*, 92 Ill. 55; *Lamar Ins. Co. v. Gulick*, 102 Ill. 45; *Farwell v. Great West. Tel. Co.*, 161 Ill. 522.

The charter was granted March 30, 1869, and section 15 of the charter provides that "nothing herein contained shall be construed as to * * * exempt said company from the operation of such general laws as may hereafter be

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passed upon the subject of insurance companies." The "act to incorporate and govern fire, marine and inland navigation insurance companies, doing business in the State of Illinois," was in force July 1, 1869. Section 19 of said act provided that "all insurance companies heretofore organized in the State of Illinois, and now doing business in this State, are hereby brought under the provisions of this act." The effect of the passage of the act was to amend the charter of said insurance company so as to make such charter conform to its provisions. *Butler v. Walker*, 80 Ill. 345; *Gulliver v. Roelle*, 100 Ill. 141; *Weidenger v. Spruance*, 101 Ill. 278; *Shufeldt v. Carver*, 8 Ill. App. 545; *Fogg v. Sidwell*, 8 Ill. App. 551; *O'Connor v. Morris*, 9 Ill. App. 415; *Felix v. Denton*, 9 Ill. App. 478.

The insurance act was amended July 1, 1874, by providing the manner of dissolving insurance companies. This statute is constitutional. *Republic Life Ins. Co. v. Swigert*, 135 Ill. 150; *Ward v. Farwell*, 97 Ill. 593; *Chicago Life Ins. Co. v. Auditor*, 101 Ill. 82.

And is a valid exercise of legislative power. *Chicago Mut. L. I. Ass'n v. Hunt, Atty. Gen.*, 127 Ill. 257.

It was the object of the Constitution of 1870 to have enacted only general laws, and the insurance act of 1869 was retained in the subsequent revision of the statutes and has, with the amendments to the same, ever since been the uniform law regulating insurance companies in this State.

After the passage of the amendment to the insurance act in regard to the dissolution of insurance companies, the remedies provided by that act were exclusive. *Richardson v. Akin*, 87 Ill. 138; *Harper v. Union Mfg. Co.*, 100 Ill. 231.

The same act, in section five, provided a remedy for a creditor of the company; it was exclusive. *Biggins v. People*, 96 Ill. 481.

The legislature had the right to change the remedy. *Chicago L. I. Co. v. Auditor*, 101 Ill. 82; *Chicago L. I. Co. v. Needles*, 113 U. S. 574.

For a creditor of an insurance company to proceed against an insolvent insurance company, and its stockholders

or members, if a mutual company, there are two ways—two remedies provided by the statute; first, under section 25 of the corporation act; second, under the insurance act. The first requires all members and stockholders to be made parties, in order to make a valid assessment against them. The second requires the State auditor to commence the proceedings, and the court to determine, in such proceeding, that the company is insolvent, and have a receiver appointed; after which a creditor may, on application in the same suit, have an assessment made. These statutory remedies are full and complete; are exclusive; the maxim *expressio unius est exclusio alterius* governs.

MR. JUSTICE BIGELOW delivered the opinion of the court.

The declaration contains seven special counts on the decree of assessment, and also the common counts, and to it, and to each count, defendant demurred; the court sustained the demurrer and dismissed the case.

That the court erred in sustaining the demurrer to the common counts, and that for the error in doing so the judgment must be reversed, is conceded by defendant in error; but it is claimed that the error was unintentional, and as counsel on both sides earnestly request us to pass upon the demurrer to the special counts, we have concluded to do so.

The only question presented for our consideration is—is defendant in error bound by the decree appointing a receiver, and the subsequent proceedings, in making an assessment of the policy holders, to pay the liabilities of the insurance company?

The contention of counsel for defendant in error is, that the entire proceedings are void, and hence no action can be maintained upon them. To sustain this contention, it is urged that there are but two methods of procedure by which the policy holders can be legally assessed to pay the debts of the insurance company. One is, by petition in chancery by the auditor of State, under a law entitled "An act in regard to the dissolution of insurance companies, approved

February 17, 1874," in force July 1, 1874 (Hurd's R. S. 1897, 916).

The other is by proceedings in equity, commenced and conducted under and in accordance with the provisions of section 25 of the general corporation act (Hurd's R. S. 1897, 425).

The first section of the act of 1874 is as follows: "That if the auditor of State, upon examination of any insurance company incorporated in this State, is of the opinion that it is insolvent, or that its condition is such as to render its further continuance in business hazardous to the insured therein, or to the public, or that it has failed to comply with the rules, restrictions or conditions provided by law, or has exceeded or is exceeding its corporate powers, he shall apply by petition to a judge of any Circuit Court of this State, to issue an injunction, restraining such company, in whole or in part, from further proceeding with its business until a full hearing can be had, or otherwise as he may direct. * * * He may, in all such cases, make such orders and decrees from time to time, as the exigencies and equities of the case may require, and in any case, after a full hearing of all parties interested, may dissolve, modify or perpetuate such injunction, and make all such orders and decrees as may be needful to suspend, restrain or prohibit the further continuance of the business of the company."

Section 5 of the act provides for the appointment of a receiver of the company, upon certain contingencies, but no provision is made whereby a creditor of the company can require the State auditor to initiate proceedings against a company, and whether the auditor shall act or not, seems to be left to his discretion. Evidently the purpose of the law was, to give the auditor supervisory control of insurance companies, organized under the laws of this State, upon the assumed ground that the business of insurance is of a public nature, and the State should see to it that none but solvent, reliable, law-abiding insurance companies should be allowed to do business in the State, and that all others having their origin here should be exterminated.

It was not intended that the State should run the business of insurance, or become a collecting agency for creditors of insurance companies; but if, in protecting the public from being defrauded by them, such creditors are aided in securing their just claims, the aid is merely incidental to the main purpose of the law.

So far as appears from the pleadings in this case, the insurance company is not insolvent, and we can not assume that it has done, or omitted to do, anything that would require the State auditor to institute proceedings to dissolve it. Since, then, a judgment creditor of the company can not, under the act of 1874, initiate proceedings against it, or require the auditor to do so, it can not, in our opinion, be held that the act provided a certain method by which the judgment creditor, in this case, could have collected his judgment.

As to the other method of procedure, so much of Sec. 25 of the act as is necessary to be considered is as follows:

25. "If any corporation or its authorized agents shall do, or refrain from doing any act which shall subject it to a forfeiture of its charter, or corporate powers, or shall allow any execution or decree of any court of record for a payment of money after demand made by the officer, to be returned 'no property found,' or to remain unsatisfied for not less than ten days after such demand, or shall dissolve or cease doing business, leaving debts unpaid, suits in equity may be brought against all persons who were stockholders at the time, or liable in any way for the debts of the corporation, by joining the corporation in such suit; and each stockholder may be required to pay his *pro rata* share of such debts or liabilities, to the extent of his unpaid portion of his stock, after exhausting the assets of such corporation. And if any stockholder shall not have property enough to satisfy his portion of such debts or liabilities, then the amount shall be divided equally among all the remaining solvent stockholders. And courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation, to appoint a receiver therefor,

who shall have authority * * * to sue in all courts, and do all things necessary to closing up its affairs as commanded by the decree of such court."

The definition of "stockholder" as given by Webster is, "one who is the holder or proprietor of stock in the public funds, or in the funds of a bank or other stock company." To be a stockholder of an incorporated company, is to be possessed of the evidence that the holder is the real owner of a certain undivided portion of the property, in actual or potential existence, held by the company in its name, as a unit, for the common benefit of all the owners of the entire capital stock of the company.

The corporation created by law is thus a trustee of the stockholders, whose interest it is its duty to guard, and the stockholders have nothing to do with the property itself, except to select persons to manage and control it.

It is clear that defendant in error is not a stockholder of the insurance company, because the company has no capital stock; but when its property became insured by the insurance company, it, by virtue of section 2 of the charter of the latter, became a member of the insurance company, and that is all that it ever was.

But it is contended that the further language of said section 25 to wit, "or liable in any way for the debts of the corporation," embraces policy holders of mutual insurance companies, and hence defendant in error was a necessary party to the proceedings for the appointment of a receiver for the company. There might be force in the contention, were it not for the following language in the same sentence, viz., "and each stockholder may be required to pay his *pro rata* share of such debts or liabilities to the extent of the unpaid portion of his stock, after exhausting the assets of the corporation," which leaves little, if any, doubt that the legislative intent was to embrace stockholders only of companies having a capital stock. Any other construction put upon the language of the section would, in our opinion, be forced and unnatural, and should not be resorted to.

Another reason why the view already expressed is the true view to take of the intent of the section, is the well known fact that stockholders of corporations are usually not a numerous body of persons, and commonly reside at or near the place where the company is located, and hence can be easily reached by process of the courts, while policy holders of a mutual insurance company are usually a numerous class of persons, and widely scattered, many residing in different States, and to require them to be severally made parties to the proceedings to collect a debt from the company, or even for the purpose of winding it up, would be to require an impossibility, since there is no way by which non-residents can be brought into court, and personal judgments or decrees rendered against them, without actual service of process upon them, within the confines of this State.

The cases relied upon to support the view that policy holders of a mutual insurance company can not be bound by the proceedings of a court of equity, appointing a receiver and assessing them, unless they are personally made parties to the proceedings, and so have had their "day in court," are *Chandler v. Brown*, 77 Ill. 333; *Chandler v. Dore*, 84 Ill. 275; *Chestnut v. Pennell*, 92 Ill. 55; *Lamar Ins. Co. v. Gulich*, 102 Ill. 41; and *Farwell v. Great Western Telegraph Co.*, 161 Ill. 532. *Chandler v. Brown* was a case unlike the case we are considering, as the *Lamar Insurance Co.*, of which *Chandler* was the receiver, was a stock company, and the proceedings were admittedly begun under the twenty-fifth section of the corporation act. The company was by decree declared to be insolvent, and "its affairs were ordered to be adjusted and closed up," while in this case the company was not insolvent, and the proceedings were not begun for the purpose of winding it up, but the bill was simply a creditor's bill, brought under section 49 of the chancery act, and all it sought was that the court of chancery should assess the premium notes of the policy holders, which the directors of the company had neglected to do as required by section 6 of the charter of the company. *Chandler v. Dore* is

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exactly like *Chandler v. Brown*. The points decided in *Chestnut v. Pennell* are that a decree against an insurance company for a fire loss is not evidence in an action against a stockholder of the company for the same loss, and again reiterates the points decided in *Chandler v. Brown*. *Lamar Insurance Co. v. Gulich* was a case brought by the insurance company for the use of its receiver on a note or bond given by Gulich to the insurance company for ten shares of its stock, and it was held that the case was governed by *Chandler v. Brown*.

In the case of *Wincock v. Turpin*, 96 Ill. 135, the court, in referring to section 25 of the corporation act, said, "but that section only applies to corporations organized under that chapter. It does not apply to or embrace bodies created by special charter."

In the case of *Great Western Telegraph Company v. Gray*, 122 Ill. 630, the court, in referring to the case of *Chandler v. Brown*, said: "The decision was one merely upon that section 25—what it provided—and is not to be taken as authority to govern in any other case than in one arising under that section. There was no purpose to depart from the well established general rule, that a court acquires jurisdiction to appoint a receiver of corporate assets by service of process upon the corporation. The stockholder is represented in his interest as such, by the presence of the corporation." Citing *Morawetz on Corp.*, Sec. 822; *Ward v. Farwell*, 97 Ill. 593; *Sanger v. Upton*, 91 U. S. 56.

In *Farwell v. Great Western Telegraph Co.*, *supra*, the court reviewed the *Gray* case, and held that the court had been deceived in deciding the case upon an alleged state of facts that had no existence; but as we understand the court the *Gray* case was properly decided; if the facts had been as alleged in the declaration—or, otherwise stated, if, in the *Gray* case, the proceedings for the appointment of a receiver and an assessment of the stockholders had been commenced before the enactment of the general incorporation act of 1872, the demurrer to the declaration or the assessment should have been overruled, notwithstanding the stock-

holders were made parties to the proceedings under which the receiver was appointed and the assessment made.

In view of what was said in the Farwell case, we are inclined to the opinion, that, in cases begun since July 1, 1872, the method provided by section 25 of the general corporation act, for appointing a receiver and assessing the stockholders of a corporation, organized for a pecuniary profit and possessed of a capital stock, supersedes all other methods excepting the proceeding authorized to be commenced by the State auditor against insurance companies; but we find it unnecessary in disposing of this case, to adjudge that question.

The Superior Court of Cook County is a court of superior general jurisdiction, and its proceedings can not be attacked collaterally except for the entire lack of jurisdiction, and we hold that section 25 of the general corporation act, entitled "An Act Concerning Corporations," approved April 18, 1872, and in force July 1, 1872, does not apply to mutual fire insurance companies organized under the laws of this State, and that the proceedings of the Superior Court of Cook County, in appointing a receiver and making the assessment of defendant in error, as declared on in this case, are valid, and that the court erred in sustaining the demurrer to the declaration and dismissing the case.

The judgment of the court is reversed and the cause remanded.

John Brown v. Frank D. Richardson and E. Richardson.

1. *FINDINGS—On Conflicting Evidence.*—Findings of fact by the judge of the trial court sitting as a chancellor, upon oral evidence, will not be disturbed unless clearly against the preponderance of the evidence.

Mortgage Foreclosure.—Trial in the Circuit Court of Jasper County; the Hon. SILAS Z. LANDES, Judge, presiding. Hearing and decree for defendant. Error by complainant. Heard in this court at the February term, 1898. Affirmed. Opinion filed August 31, 1898.

GIBSON & JOHNSON, attorneys for plaintiff in error.

FITHIAN, DAVIDSON & KASSERMAN, T. J. FITHIAN and I. D. SHAMHART, attorneys for defendants in error.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

This action was brought to foreclose a mortgage securing a promissory note for \$500. Defendants in error claim that the note is paid. Plaintiff in error denies payment. This is the only issue in the case. The testimony is squarely conflicting. It would serve no useful purpose to review or analyze it. There is abundant evidence to sustain the finding of the chancellor that the note has been paid if the witnesses who testified to its payment told the truth. He saw and heard them, and for this reason was better qualified to pass upon their testimony than we are. Findings of facts by the chancellor upon oral evidence will not be disturbed unless clearly against the preponderance of evidence. *Burgett et al. v. Osborne et al.*, 172 Ill. 227. Judgment affirmed.

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Missouri Malleable Iron Co. v. Mollie Hoover, Adm'x.

1. INSTRUCTIONS—*To Find for Defendant, When.*—Where, at the close of plaintiff's case, there is evidence tending to prove the facts alleged in the declaration, it is not error for the trial court to refuse an instruction to find for the defendant and submit the case to the jury.

Trespass on the Case.—Death from negligent act. Trial in the City Court of East St. Louis; the Hon. BENJAMIN H. CANBY, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the February term, 1898. Affirmed. Opinion filed August 31, 1898.

STATEMENT.

This action was brought by appellee to recover damages of appellant for negligently causing the death of her intes-

tate, who was twenty-two years of age and was a grinder in the employ of appellant, a large company engaged in the manufacture of iron castings, machinery and railroad supplies. Deceased was killed by the bursting of an emery wheel, which he was using in polishing castings. The grounds of negligence complained of were defective machinery, and running the emery wheel at a high and dangerous rate of speed, without the knowledge of deceased.

Appellant had been using emery wheels of a certain make, the bore of which fitted the shaft or arbor, on which the wheels were hung, but having exhausted its supply and being hurried with work, it purchased at St. Louis a wheel of different manufacture, the bore of which was three thirty-seconds of an inch larger than the shaft on which it was placed. It was the business of the foreman of the establishment, who was a machinist, to hang and adjust the wheel on the shaft, and in doing so he wrapped two thicknesses of pasteboard around the shaft, and shoved the wheel on over them, deceased aiding him in his work. A short time after the wheel was started, and when running at high speed, it burst and injured the deceased, who, in consequence, died a few hours thereafter. Plaintiff recovered a verdict and judgment for \$1,500, from which defendant has appealed.

POLLARD & WERNER, attorneys for appellant.

JESSE M. FREELS and M. MILLARD, attorneys for appellee.

MR. JUSTICE BIGELOW delivered the opinion of the court.

Although several errors are assigned, only one is relied upon, and that is, the refusal of the court to instruct the jury to find for the defendant.

In the case of Illinois Steel Co. v. Schymanowski, 162 Ill. 447, the court said: "We have often said that where there is evidence tending to establish a cause of action, it is not error to refuse a peremptory instruction to find for the defendant."

Sometimes the court has seemed to enlarge the rule as above stated, but a careful examination of the cases from which this inference is drawn will show that the court has perhaps said more in particular cases than was necessary, without modifying the rule itself.

In the late case of *North Chicago Street Railway Co. v. Wiswell*, 168 Ill. 613, the court said: "We have frequently said, and it seems almost unnecessary to repeat it, or to cite authorities, that where, at the close of plaintiff's case, there is evidence tending to prove the facts alleged in the declaration, it is not error for the trial court to refuse an instruction of this character and to submit the case to the jury. *Cicero and Proviso Street Railway Co. v. Meixner*, 160 Ill. 320; *Pullman Palace Car Co. v. Laack*, 143 Id. 242; *Lake Shore & Michigan Southern Railway Co. v. Richards*, 152 Id. 59; *Wenona Coal Co. v. Holmquist*, Id. 581; *Purdy v. Hall*, 134 Id. 298; *Chicago & Northwestern Railway Co. v. Dunleavy*, 129 Id. 132; *Bartelott v. International Bank*, 119 Id. 259; *Simmons v. Chicago and Tomah Railroad Co.*, 110 Id. 340."

The principal point relied upon by the plaintiff as a ground for recovery, was that the bore through the emery wheel was too large for the shaft or arbor, and that it was imperfectly bushed, and for this reason the wheel was at no time safe to be run.

To meet and overcome this theory, several witnesses on the part of appellant testified that the size of the bore was immaterial, and the only necessity for bushing it was to set the wheel true on the shaft or arbor, and once it was properly set, the shoulder on one side of the wheel and the clamp on the other side would hold it in place, even though the wheel were not bushed at all.

Appellant's general superintendent and its superintendent of the machinery department so testified, and they were followed by a number of so-called experts, who testified to the same effect; on the other hand several witnesses testified to the opposite; hence it became a question for the jury to decide, and we are unable to say they made a mistake.

Appellant endeavored to show that the deceased was himself a superintendent of the grinding department, and since he helped the superintendent of machinery adjust the wheel on the shaft it was his own fault if the job was imperfectly done, and he was guilty of such contributory negligence as would prevent a recovery. This also was a question of fact for the jury, and we think their decision right.

There was evidence from which the jury might infer that deceased was in the exercise of ordinary care.

The jury, at the request of appellant, were fully instructed as to the duty of a master to furnish his servant with safe and proper machinery and appliances and to keep the same in repair, and the jury having found the controverted questions of fact in favor of appellee, and the damages assessed being reasonable, there is no good reason for disturbing the judgment, and it is affirmed.

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Connecticut Mutual Life Insurance Co. v. Robert J. Young, Adm'r.

1. **INSURANCE—Warranties in the Application, etc.**—Where the application is expressly declared to be a part of the policy and the statements therein contained are warranted to be true, such statements will be deemed material whether they are so or not, and if shown to be false there can be no recovery on the policy.

2. **SAME—Statements in the Applications.**—Statements in an application of insurance will be held to be warranties, when they enter into and are made a part of the contract, and to be representations, in contradistinction from warranties, when they form no part of the contract, but were made only as an inducement to it.

3. **SAME—Misrepresentations in the Applications.**—A misrepresentation or concealment by the applicant for insurance of a fact specifically inquired about by the insurer though not material, will have the same effect in exonerating the insurer from the contract of insurance as if the fact had been material, since, by making such inquiry, the insurer implies that he considers it to be so.

4. **SAME—Application a Part of the Contract.**—Where an application is part of the insurance contract, the assured's answers to the

Connecticut Mut. Life Ins. Co. v. Young.

questions put to him are warranties, and must be truthfully made in order that the contract of insurance bind the company.

Assumpsit, on a life insurance policy. Trial in the City Court of Alton; the Hon. ALEXANDER HOPE, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the February term, 1898. Reversed. Opinion filed August 31, 1898.

ISHAM, LINCOLN & BEALE and HENRY S. BAKER, attorneys for appellant.

Where, by the terms of the policy, the application is made a part of it, and in said application it is declared and warranted that the answers therein made are true, then all said answers are warranties, and the falsity of any of said answers being shown, the policy becomes void whether said answers were material to the risk or not. American and English Encyclopædia of Law, Vol. 13, p. 663, 1st Ed.; American and English Encyclopædia of Law, Vol. 11, p. 229, 1st Ed.; American and English Encyclopædia of Law, Vol. 11, p. 302, 1st Ed.; Mutual Benefit Life Insurance Company v. Robertson, 59 Ill. 123; Teutonia Life Insurance Company v. Beck, 74 Ill. 165; Fame Insurance Company v. Thomas, 10 Ill. App. 545; Thomas v. Fame Insurance Company, 108 Ill. 91; Mutual Aid Association v. Hall, 118 Ill. 169; Morgan v. Bloomington Mutual Benefit Association, 32 Ill. App. 79.

The question to be determined in this case is not whether the insured at the time of making said application was suffering from any disease, or whether he thought he was affected by any disease, but the issue is whether there was any fraud, untruth, evasion or concealment of the facts in his answers to said application, and if any of said answers were untrue, or false, or concealed the facts, then the appellee can not recover. Morgan v. Bloomington Mutual Life Benefit Association, 32 Ill. App. 79; A. O. U. W. v. Cressey, 47 Ill. App. 616; Bloomington Mutual Life Benefit Association v. Cummins, 53 Ill. App. 530; Metropolitan Life Insurance Company v. Zeigler, 69 Ill. App. 447; Continental Life Insurance Company v. Rogers, 119 Ill. 474.

JOHN F. MCGINNIS, attorney for appellee.

The language of the policy being the language of the insurer, is to be construed, in cases of doubt, most favorably for the insured. *Niagara Fire Ins. Co. v. Scammon*, 100 Ill. 644; *Schroeder v. Trade Ins. Co.*, 109 Ill. 157; *Greenwich Insurance Co. v. Raab*, 11 Ill. App. 636.

MR. PRESIDING JUSTICE CREIGHTON delivered the opinion of the court.

This was an action in *assumpsit* in the City Court of Alton, by appellee against appellant, to recover on a policy of insurance which appellant had issued on the life of appellee's intestate.

The declaration consists of a special count on the policy and the common counts. Appellant files special pleas, setting up, in substance, that the policy is based on an application therefor made by appellee's intestate; that the application is a part of the contract of insurance; that in the application intestate made answers to certain questions propounded therein; that in the application intestate declared and warranted all his answers therein to be in all respects fair and true answers to the said questions, and agreed that the application, answers, warranties and agreements therein contained should be a basis of the contract of insurance, a part of the consideration for it, and should be a part of the contract, and that if there should be in any of the answers made, any fraud, untruth, evasion or concealment of the facts, that then the policy should be null and void; and charging that the intestate did not in his application in all respects make fair and true answers to certain of the questions therein, and that in certain of the answers there was fraud, untruth, evasion or concealment of facts, and that thereby the policy became and is null and void.

Trial was by jury. Verdict and judgment in favor of appellee for \$1,026.93.

The policy, embracing a copy of the application, was introduced in evidence by appellee, and the original application was introduced by appellant. Among the questions asked and answered in the application are: "What is the

present state of your health? Good. Is there now existing any disease, disorder, infirmity, weakness or malformation? No. For what else have you consulted with or been attended by a physician or surgeon? For no sickness, but drinking ice water last week. Give dates, duration and effect upon health? None. Taphorn [is] the only such [doctor I have had] in my life. Name the residence of such physician or surgeon? Dr. G. Taphorn. Of your usual physician? Dr. G. Taphorn, Alton, Ill. Is there any fact relating to your physical condition, personal, or family history or habits which has not been stated in the answers to the foregoing questions, and with which the company should be made acquainted? No. Have you reviewed the written answers to the above questions, and are you sure that they are full, correct and true? Yes."

The application also contains the following:

"It is hereby declared and warranted that the above are in all respects fair and true answers to the foregoing questions; and it is agreed by the undersigned that this application and the several answers, warranties and agreements herein contained shall be a basis of, a part of the consideration for, and a part of the contract of insurance, * * * and that if there be, in any answer herein made, any fraud, untruth, evasion or concealment of facts, then any policy granted upon this application shall be null and void."

The first clause in the policy is: "The Connecticut Mutual Life Insurance Company of Hartford, Conn., in consideration of the application for this insurance, which is the basis of, and a part of this contract, and a copy whereof is hereto annexed, and of the several answers, warranties and agreements therein contained, and of the annual premium of \$22.85, to be paid to them on the 22d day of August, 1896, and on or before the same date in every year during the continuance of this policy, do hereby insure the life of Robert P. Stewart."

The application was made August 17, 1896, the policy issued August 22, 1896, and the insured, after a short illness, died January 10, 1897, of apoplexy.

Appellant contends that the answers made to all the questions in the application are warranties, and that certain of them are false, evasive and conceal facts called for by the questions.

Appellee contends that the answers made to the questions are mere representations and not warranties. The distinction between the effects of warranties and mere representations in a contract for insurance is clearly stated in the *Continental Life Insurance Company v. Caroline S. Rogers*, 119 Ill. 474. On page 482 the court says: "It is, however, generally true, that where the application is expressly declared to be a part of the policy, and the statements therein contained are warranted to be true, * * * such statements will be deemed material, whether they are so or not, and if shown to be false there can be no recovery on the policy, however innocently made, and notwithstanding their falsity may have no agency in causing the loss or producing the death of the assured." And on page 484: "If the answers, however, are simply representations, as contradistinguished from warranties, in the technical sense of those terms, then such of the answers, not material to the risk, as were honestly made, in the belief that they were true, would not be binding upon the assured, or present any obstacle to a recovery."

Statements in an application of insurance must be held to be warranties when they enter into and are made a part of the contract, and must be held to be representations, in contradistinction from warranties, when they form no part of the contract, but were made only as inducement to it. In *Fame Ins. Co. v. Thomas*, 10 Ill. App. 545, on page 555, the court says: "Nor is the materiality of a fact about which specific inquiry is made, open to discussion. The rule on this subject is laid down by Mr. Phillips as follows: "A misrepresentation or concealment by one party of a fact specifically inquired about by the other, though not material, will have the same effect in exonerating the latter from the contract, as if the fact had been material, since, by making such inquiry, he implies that he considers it to be

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so." In the same connection the author further remarks that this rule is particularly applicable to written answers to written inquiries referred to in the policy. It is so because a party, in making a contract, has a right to the advantage of his own judgment of what is material, and if, by making a specific inquiry, he implies that he considers a fact to be so, the other party is bound by it as such. These rules are especially applicable where, by the terms of the policy, the application is made a part of the contract and a warranty by the assured, and where the assured undertakes, in any form, that his answers are full and correct. In such cases, no question of knowledge, good faith or materiality arise, but it is simply a question of truth and fullness of the answers, and the want of either is fatal."

To the same effect is *Morgan v. Bloomington Mut. Life Benefit Ass'n*, 32 Ill. App. 79. In *Bloomington Mut. Life Benefit Ass'n v. Cummins*, 53 Ill. App. 530, it is held, that where the application is made a part of the policy, the policy, with all its terms and conditions, constitutes the contract between the parties, and that the warranties in such case must be literally true or the contract is avoided.

In *Metropolitan Life Ins. Co. v. Zeigler*, 69 Ill. App. 447, it is said: "The policy was issued upon consideration of the answers and statements contained in the application, all of which were declared to be warranties and made part of the contract, and it was also provided that if any such statements were not true the policy should be void. * * *

Where the application is expressly declared to be a part of the policy, and the statements therein are warranted to be true, such statements will be deemed material whether they are so or not, and if shown to be false there can be no recovery on the policy."

To the same effect are: *Mutual Benefit Life Ins. Co. v. Robertson*, 59 Ill. 123; *Thomas v. Fame Ins. Co.*, 108 Ill. 91; *Mutual Aid Ass'n v. Hall*, 118 Ill. 173, and *Connecticut Life Ins. Co. v. Rogers*, 119 Ill. 474. This question has been recently under consideration by the Illinois Appellate Court for the First District, in *National Union (a benefit insurance association) v. Margareth Arnhorst*, a case not yet published in the reports, in which it

is held that where an application is part of the insurance contract, the assured's answers to the questions put to him are warranties and must be truthfully made in order that the contract of insurance bind the company.

In this case the application is clearly a part of the insurance contract; so clearly agreed and stated in the application, and so clearly recited in the first clause of the policy, and a copy of it embraced therein as part of the policy. There is no qualifying, limiting or superseding clause either in the application or in the policy, as was the case in *Continental Life Ins. Co. v. Rogers*, where the policy contained the additional statement, that "if this policy has been obtained by or through any fraud * * * said policy shall be * * * null and void." Which clause, it is held by the court, relieved the preceding answers from their character as warranties, and rendered the policy void only for some fraud in obtaining it or for some answer material to the risk, not honestly made in the belief that it was true. The language in this case is not "if this policy has been obtained by or through any fraud," etc., but "if there be in any answer herein made, any fraud, untruth, evasion or concealment of facts, then any policy granted upon this application shall be null and void." The answers and statements in the application in this case are warranties, and must be deemed material whether they appear to us to be so or not, and if any of them be untrue, evasive, or so made as to conceal any fact fairly called for by the questions, whether intentional or not, then there can be no recovery on the policy.

The undisputed testimony shows that the assured, appellee's intestate, did on the 10th of June, 1896, and frequently thereafter, both prior and subsequent to the obtaining of the insurance policy sued on, consult Dr. Theodore Milen, a physician of St. Louis, Missouri, concerning his, assured's, physical condition, and was continuously professionally treated by said physician from June 10, 1896, to within five days of his death. The testimony of Dr. Milen is uncontradicted, its truthfulness unchallenged, and in chief, as abstracted, is as follows:

“My name is Theodore Milen. I am forty-three years of age, and I reside at 3524 Page boulevard, St. Louis, Mo. I am a physician and have been in general practice since 1889. My office is now located at 1305 Grand avenue, St. Louis, Mo. I was formerly at the corner of Broadway and Market streets, St. Louis. I knew Robert P. Stewart in his lifetime. I knew him in a professional way. He came to my office for consultation and I gave same to him. He first came to see me in that way on June 10, 1896. I gave him prescriptions on that day. I could not say on how many days and dates I gave him prescriptions subsequently. He came down from Alton occasionally, and was here at my office last on the 5th day of January, 1897. Yes, he was at my office during the month of July, 1896, and also during the month of August, 1896, but I could not say exactly on what dates during those months. I know that I gave him prescriptions during the month of August. I can not say positively that he called during the months of September, October, November and December, 1896, but I suppose he did, as he was in several times after the 10th day of June, his first visit. I should say he called to see me at least a dozen times. I gave him a prescription each time. These prescriptions were sedatives; I think the ingredients were about the same each time.”

On cross-examination, over appellant's objections, Dr. Milen testified in substance, that intestate's general health was good. “He came to me, as many young men do, believing that he was not strong sexually.” The trouble complained of was not a disease; it is nervous healthy men that have the particular trouble he complained of, if it is a trouble at all. That in his opinion intestate had no disease, infirmity, weakness or malformation of the genital or urinary organs; that he gave him the prescriptions because he asked them; that the prescriptions did not have any particular effect on his health; they were principally bromide in five grain doses, and that the condition for which he treated intestate would not increase the risk on his life.

The statements and answers in the application being warranties, the question was not what the evidence now may show the condition of intestate's health to have been when he took out the insurance, nor whether there were facts concealed that we now think might have increased the risk, nor whether the concealment was intentional; but does the evidence now show that there is in the statements and answers of intestate, as they appear in his application, untruth, evasion or concealment of any facts?

The undisputed and uncontested evidence most clearly shows that there is in the statements and answers made by intestate in his application, untruth, evasion and concealment of facts. His answers and statements are such as to induce the belief in the appellant, at the time of issuing the policy, that intestate had never in his life consulted any physician professionally concerning himself, except Dr. Taphorn of Alton, concerning drinking ice water the previous week; and the numerous consultations with Dr. Milen, and Dr. Milen's continuous treatment of intestate for more than two months immediately prior, up to and at the time of making the application, was fairly called for by the questions in the application, and these facts were not disclosed in the statements and answers, but were entirely concealed.

Under the issues and evidence in this case, a breach of the warranties being thus established is an absolute bar to any recovery by appellee on the policy in suit.

The judgment of the trial court is reversed.

County Board of Union County v. David C. Short et al.

1. ELECTION DISTRICTS—*Power of the County Board to Change.*—The Board of Supervisors has no power to make changes in election districts, except at a regular or special meeting in the months of either July or August. It is powerless to do so at a meeting held in September.

County Board of Union County v. Short.

2. *STATUTES—Rule of Construction.*—Where the terms of a statute are clear and precise, its sense manifest, and its consequences, upon a literal construction, not absurd or palpably unjust nor contrary to any imperative public exigency, it should be construed according to its plain and natural import.

Certiorari, to quash proceedings of the board of supervisors. Trial in the Circuit Court of Union County; the Hon. OLIVER A. HARKER, Judge, presiding. Hearing and proceedings quashed. Appeal by respondent. Heard in this court at the February term, 1898. Affirmed. Opinion filed August 31, 1898.

JAMES LINGLE, attorney for appellant.

DODD & PICKBELL, attorneys for appellees.

MR. PRESIDING JUSTICE CREIGHTON delivered the opinion of the court.

Appellant's statement of the case is sufficiently full, substantially correct, and is as follows:

"The County Board of Union County, on the 20th of September, 1897, in response to a petition presented for that purpose, made an order altering the election precinct of Lick Creek, by detaching therefrom Sections 1, 11 and 12, and attaching the same to Rich precinct. On the 13th of October, 1897, appellees filed their petition for a writ of certiorari to bring up the record. The petition prays that the record may be quashed upon the single ground that the County Board made the alteration mentioned at a time unauthorized or prohibited by law. Appellant certified the record as required, and thereupon entered a motion to quash the writ, the motion to quash being based upon the sufficiency and legality of the record and the insufficiency of the petition. The cause was heard at the November term of the Circuit Court, when the motion of appellant to quash the writ was overruled, a finding that the County Board acted without authority, and an order made quashing the record; to all of which appellant duly excepted, and prosecutes this appeal to reverse the finding and order of the trial court."

Appellant contends that section 29 gives the County Board power to change boundaries and create new precincts at any time it sees fit to do so; that it is plainly written in the law, and that it is the duty of courts to take the law as they find it and enforce it as it is.

To our minds it is not plainly written in the law. The language of sections 29 and 30, as they now stand, is the patch-work result of numerous amendments. The composition does not appear in such lines of contiguity and sequence as it might if all the conditions sought to be provided for by so many amendments had existed or had been appreciated from the beginning. The chief purpose of the phrase in section 29, "but said County Board may, from time to time, change the boundaries of election precincts and establish new ones," is to express that the board should have power to make more than one change; that its power to make changes would not be exhausted when it had made the changes first provided for in the section. These sections are *in pari materia* and should be construed together, and in the light of all the provisions of the statute concerning elections. The words "from time to time," when read as they must be, in connection with section 30 and all the other provisions of the chapter, may be limitations upon the time. They do not necessarily mean "at any time," or at all times, but may mean, at times to recur; and no times are anywhere mentioned for re-adjusting election districts, except at July or August meetings of the board after November elections. If these words will admit of such meaning, and it is necessary for them to be so interpreted to give effect to the whole statute and make its operation practicable, then it is our duty to so interpret them.

Appellant presses upon our attention the following, as law supporting its case:

"Where the terms of a statute are clear and precise, its sense manifest and its consequences, upon a literal construction, not absurd nor palpably unjust, nor contrary to any imperative public exigency, it should be construed according to its plain and natural import."

Hanover Fire Ins. Co. v. Harper.

We are satisfied with this as a correct rule of statutory construction, but if it were admitted that the terms of the statute under consideration are clear and its sense manifest, still, its consequences upon such construction as appellant contends for are "absurd," and are "palpably unjust," and are "contrary to imperative public exigency."

To give to the statute the construction contended for by appellant would enable a County Board, within the last ten days prior to an election, to create any number of new election precincts, and change the boundaries of all the precincts in the county, thereby to destroy all the election districts, thus rendering all the provisions of section 30 nugatory, and making performance of most of the provisions of the election law absolutely impossible. This could not have been the legislative intent.

The finding, order and judgment of the Circuit Court is affirmed.

Hanover Fire Insurance Co. v. W. R. Harper.

1. *INSURANCE—Condition Precedent to Suits on Policies.*—A condition in a policy providing for the appraisal of the property destroyed in a case of disagreement as to the amount of loss, can not be regarded as a condition precedent to bring a suit unless there has been in fact a disagreement as to the amount of such loss.

2. *SAME—What is Not a Condition Precedent in this Case.*—Where the conditions of a policy on insurance provides for the appraisal of the property in case of a disagreement as to the amount of loss, such appraisal is not a necessary condition precedent unless there has been a disagreement between the parties as to the amount of loss.

Assumpsit, on a policy of insurance. Trial in the Circuit Court of Saline County; the Hon. ALONZO K. VICKERS, Judge, presiding. Judgment for plaintiff on demurrer. Appeal by defendant. Heard in this court at the February term, 1898. Affirmed. Opinion filed August 31, 1898.

CHOISSER, WHITLEY & CHOISSER, attorneys for appellant.

PARISH & PARISH, attorneys for appellee.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

This is an action on a policy of insurance. Appellant demurred to the declaration, alleging that the policy of insurance, which is made part of the declaration, requires an appraisal of the property in case of a disagreement as to the amount of loss, and that no suit shall be brought on such policy until appraisal has been had. That this condition of said policy is a condition precedent to bringing suit, and that the plaintiff in his declaration does not aver its performance nor excuse its non-performance. The demurrer was overruled and appellant abided by his demurrer. Default was entered for want of plea. Damages were assessed by the court, after hearing evidence, at \$1,766, and judgment rendered for this amount and costs of suit.

Appellant assigns four errors on the record, but says in his argument, "We only desire to consider the first error assigned, that is, the court erred in overruling the demurrer. If we sustain this proposition, then it follows that no evidence should have been heard and no judgment rendered against defendant."

A demurrer admits all the facts that are well pleaded. If appellee's allegations then entitle him to recover, the demurrer was rightly overruled. As no exception is taken to any allegation in the declaration, or to the lack of any allegation except that there is no averment of an appraisal, we may assume that the declaration is in all other respects sufficient. If an appraisal was a condition precedent to bringing suit, then the declaration is not sufficient and the demurrer should not have been overruled.

The special cause of demurrer as stated in the demurrer, is as follows: "The policy of insurance which is made part of plaintiff's declaration, provides for an appraisal of the property in case of a disagreement as to the amount of loss, and that no suit shall be brought on said policy until such appraisal has been had, when appraisal has been required." The case will be considered as made by the demurrer. Is, then, an appraisal under the terms of this policy a condition precedent in all cases before suit can be brought?

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This question is answered by reference to the condition in the policy as stated in the demurrer. The policy "provides for an appraisal of the property in case of a disagreement as to the amount of the loss." It follows, then, that if there is no disagreement as to the amount of loss, no appraisal is required before commencing suit.

The clauses relied upon by appellant as requiring an averment of appraisal, are in substance as follows: "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deductions for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the assured and this company, or, if they differ, then by appraisers as hereinafter provided."

"In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers."

"This company shall not be held to have waived any provision or condition of this policy, or any forfeiture thereof, by any requirement, act or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by the company, including an award by appraisers when appraisal has been required."

"No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the assured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

It will be seen by an examination of these clauses, that an appraisal is not required unless there has been a disagreement between the insured and the company as to the amount

of loss. Clearly no averment of an appraisal is necessary unless the appraisement itself was necessary. A disagreement can not be presumed by the court in order to sustain a demurrer. If any presumption is indulged, in the absence of evidence, it would be that when sworn proofs of loss are furnished as required by the policy, the loss is correctly stated, and that there is no disagreement. Men are presumed to be honest rather than dishonest, truthful rather than untruthful. No exception being taken to the declaration except the special cause of demurrer assigned, it is taken to be in all other respects apt and complete. The demurrer admits the truth of all facts well pleaded. Proofs of loss sworn to and a certificate furnished with all other requirements fulfilled, and no disagreement being shown in the declaration, how can the court say on the face of the papers that there was a disagreement as to the amount of loss, and in consequence thereof an appraisal was necessary? And yet it must appear on the face of the declaration that it was necessary, or its averment is not necessary; and if its averment is not necessary the demurrer was properly overruled.

"A condition in a policy providing for an arbitration can not operate to deprive the insured of his right of action, unless clearly made a condition to the existence of such right." *Birmingham Fire Ins. Co. v. Pulver*, 126 Ill. 338.

When a policy provides that "in case differences shall arise touching any loss or damage * * * the matter shall, at the written request of either party, be submitted to arbitrators," the Supreme Court has repeatedly decided that the request was a condition precedent to requiring an arbitration. *Birmingham Fire Ins. Co. v. Pulver*, *supra*.

Our construction of the terms of this policy is sustained by the opinion of the Supreme Court in *German Fire Ins. Co. v. Steiger*, 109 Ill. 256. In this case the policy contained the following conditions:

"Loss and damage to property totally or partially destroyed, unless the damage is agreed upon between the assured and the company, shall, at the request of either

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party, be appraised. * * * It is expressly covenanted by the parties hereto, that no suit or action against this company for the recovery of any claim by virtue of this policy, shall be sustainable in any court of law or of chancery, until after an award shall have been obtained fixing the amount of such claim in the manner above provided."

Defense was made on account of the want of an award, the objection being raised to the sufficiency of the proof in not containing such award, and to the refusal of an instruction asserting the necessity of an award. The court say: "We are of the opinion that, reading all the above conditions together, the appraisal and award which were contemplated, were to be at the written request of one of the parties; that such written request was a condition precedent to such appraisal and award; and that there not having been a written request by either party for an appraisal, an appraisal and award were not necessary under the conditions in order to entitle the plaintiff to recover."

It is clear that in the above case, if a "written request" was a condition precedent to the necessity of an appraisal and award, the existence of the "condition precedent" must appear in the declaration before a failure to aver an appraisal and award would be a defense that could be raised by demurrer. So in the case at bar. If a disagreement as to the amount of loss was a condition precedent before an appraisal was required, the fact of a disagreement must appear in the declaration before the lack of an averment of appraisal can be reached by demurrer. A demurrer reaches only a defect which is apparent on the face of the pleading.

That an award is necessary only in a case of disagreement, under a policy similar to the policy in this case, was held in *Vangindertaelen v. Phoenix Ins. Co.*, 82 Wis. 112. The clause in reference to award was in substance: "The amount of damage may be determined by agreement between the company and the insured, or, failing to agree, the same shall then be determined by arbitration." Pass-

ing upon this clause, the court holds that arbitration was only provided for in case the parties failed to agree, and that the award was only a condition precedent in case of disagreement.

Appellant cites *Mosness v. German Ins. Co.*, 50 Minn. 341, and say in this case a demurrer was sustained to the complaint. The case does not support appellant's position, for the reason that the complaint in the case above shows that there was a disagreement. The court says: "The language used constituted a condition precedent to plaintiff's right of action when circumstances transpired to which the language was applicable; that is, when the insurer and the insured disagreed over the amount of the loss. Now from the allegations of this complaint, it clearly appears that a dispute had arisen between these parties as to the very matter covered and provided for by these provisions, and that there existed a condition of affairs which demanded an appraisal and award in the manner expressly stipulated for in the insurance contract." This case would have been in point if the declaration, in the case at bar, had stated there was a disagreement as to the amount of loss, but it does not.

In *Kahnweiler et al. v. Phoenix Ins. Co.*, 57 Fed. Rep. 562, the objection that there was no award did not arise on demurrer but in the trial of the case, in which it appeared there had been a disagreement, and that there was no award. The court say: "It must be observed that in the case at bar the provision for arbitration is absolute, and forms part of the contract. It is also in terms declared to be a condition precedent to bringing suit." *Phoenix Ins. Co. v. Stocks et al.*, 149 Ill. 324, is relied upon by appellant. In this case it is said: "It seems to be well settled in this State, whatever may be the rule elsewhere, that the plaintiff is required only to allege and prove such matters as appear to be conditions precedent in the policy." And again: "The rule so often announced by this court, that in construing these and like clauses, that construction is to be adopted which is most favorable to the assured, applies." The question involved in the case at bar did not arise on demurrer in the *Stocks*

case. An examination of the case as reported shows, too, that the language of the policy was much stronger than in the present case. The policy provided that "The amount of * * * damage to the property * * * may be determined by mutual agreement * * * or failing to agree, shall then be submitted to * * * arbitrators. It is * * * expressly provided * * * that no suit or action * * * shall be sustainable * * * until after an award shall have been obtained finding the amount of such claim in the manner above provided, which is agreed to be a condition precedent." The court say: "The insured must arbitrate or offer to do so unless the obligation is waived, while the company may or may not, at its option. These conditions do not exist in the policy sued on in the case at bar. In it the appraisal is only required in case of disagreement, and the loss is not payable until sixty days after notice, ascertainment, estimate and satisfactory proof of the loss, * * * including an award by appraisers when appraisal has been required." This falls far short of the terms of the policy in the Stocks case, of which the court say, "the insured must arbitrate, or offer to do so, unless the obligation is waived."

In Chippewa Lumber Co. v. Phoenix Ins. Co., 80 Mich. 122, the question was not raised upon demurrer, but in the trial. The court say: "The policy in the present case provides that the amount of loss shall be submitted to arbitration. The right to arbitrate is not made conditional upon a written request of either party."

In Johnson et al. v. Humboldt Ins. Co., 91 Ill. 94, the language of the policy was: "That no suit * * * shall be sustainable * * * until after an award shall have been obtained," etc. This is not the language of the present policy, there being in it no unconditional requirement of an award.

In Niagara Fire Ins. Co. v. Bishop, 154 Ill. 14, the terms of the policy are similar to the terms in the case at bar. But the question was raised upon a special plea, averring

that there was a disagreement, and that the defendant demanded an appraisal as provided in the policy.

This case shows, too, the proper way of raising this question on a declaration and policy such as are in the case at bar, namely, by special plea instead of by demurrer.

Rockford Ins. Co. v. Nelson, 65 Ill. 418, cited by appellant, does not hold differently when properly considered. In it the court say: "But all conditions subsequent to the right of recovery * * * may be omitted and left to be set up as a defense." The right of recovery exists when the insured has suffered loss and has made proof as required by the policy. If the company does not agree with him in his estimate of his loss, it is a condition subsequent to his right of recovery to be pleaded as a defense.

By the terms of the policy, an appraisal being necessary only in case of disagreement, and no disagreement appearing in the declaration, none can be presumed in order to support the demurrer.

No other exception being taken to the declaration, it must be regarded as apt and complete, and the demurrer properly overruled. Judgment affirmed.

City of Effingham v. Henry Surrells.

1. **SURFACE WATERS—In Cities.**—A city has no right to collect surface water and carry it out of its natural course to the vicinity of a person's premises without furnishing an outlet for it.

2. **CITIES AND VILLAGES—Not Primarily Liable for the Obstruction of a Water-Course.**—A city is not primarily liable for the obstruction of a water-course, but having notice that a citizen had obstructed a water-course, it is liable for not either requiring the citizen to remove the obstruction or itself providing an escape for such waters.

Trespass on the Case, to recover damages caused by the flow of water upon plaintiff's premises. Trial in the Circuit Court of Effingham County; the Hon. SAMUEL L. DWIGHT, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the February term, 1898. Affirmed. Opinion filed August 31, 1898.

City of Effingham v. Surrella.

T. E. GILMORE, City Attorney, E. N. RINEHART and B. F. KAGAY, attorneys for appellant.

The right to recover damages in an action of this kind is based on two propositions: That the party plaintiff has suffered an injury, and the party defendant is legally liable for having caused such injury. Sutherland on Damages, pages 3 and 4, and authorities there cited.

No one can be held responsible for all the consequences of his acts or defaults, but only for those which the law considers the natural consequences.

Where a party does an act which is the direct cause of injury to another he is absolutely liable, whether the case arises *ex contractu* or *ex delicto*. 5 A. & E. Ency. 5.

Where other causes intervene between the act of the defendant and the injury, the efficient cause will be held responsible. 5 A. & E. Ency. 9, and note.

In the note above cited it is held that if two or more contribute to an injury, and it is uncertain which contributed most, or without the concurrence of both the injury would not have occurred, no recovery can be had against either. And the plaintiff must prove that the injury is the proximate consequence of the act complained of. Citing Wood's Mayne on Damages (Ed. 1880).

A party erecting an obstruction to the flow of surface water is not required to provide against, nor can he be held responsible for, damages occasioned by extraordinary floods. Note on p. 10, 5 A. & E. Ency.

G. F. TAYLOR and S. F. GILMORE, attorneys for appellee.

Any person diverting the flowage of water from its natural course must so direct and control its course as not to injure the property of others. Anderson v. Henderson, 124 Ill. 164; Gormley v. Sanford, 52 Ill. 158; Toledo, W. & W. R. Co. v. Morrison, 71 Ill. 616; Herrington v. Peck, 11 Ill. App. 62.

The same rule governing individuals with respect to the diversion of water from its natural course applies to incorporated towns and cities. If a city in grading its streets

throws water upon the grounds of one of its citizens, or creates a stagnant pool in the neighborhood that brings disease, it is liable for the damages that occur to such citizen. *Nevins v. Peoria*, 41 Ill. 502; *City of Aurora v. Gillett*, 56 Ill. 132; *City of Aurora v. Reed*, 57 Ill. 29.

A city has no right to conduct surface water, that would not naturally flow there, by or upon the property of a citizen, and if it does so and damages accrue, the city is liable, even though other property owners fill up the land in front of their property so as to turn the water, thus wrongfully diverted, by the injured premises or upon said premises. *City of Aurora v. Reed*, 57 Ill. 29; *C. & A. R. R. Co. v. Conners*, 25 Ill. App. 561.

It is the duty of cities to provide suitable and proper sewerage to carry off water that accumulates on their streets. They are armed with ample powers to provide means therefor, even to condemn ground for that purpose if necessary. *City of Aurora v. Reed*, 57 Ill. 29.

MR. PRESIDING JUSTICE CREIGHTON delivered the opinion of the court.

This was an action by appellee against appellant, in the Effingham Circuit Court, to recover damages caused by flow of water upon appellee's premises. A number of years ago appellant and the Illinois Central Railroad Company constructed a ditch for the drainage of the water from the streets of the city, and also for the drainage of the right of way of the railroad, which ditch has been maintained to the present time. This ditch, so constructed and maintained, was sufficient to carry off all the water diverted to it from streets of the city, so long as it was kept open and kept in repair. As first constructed, it changed the flow of water from its natural course to a considerable extent, and in 1894 appellant put in an eighteen-inch tile across Fayette avenue, which caused the diversion of a much larger quantity of water from its natural course into this ditch. The ditch is on the right of way of the railroad company.

In 1895 the railroad company put in a turn-table which

obstructed and filled up a portion of the ditch; under the turn-table it placed an eighteen-inch tile, which was insufficient to carry off the water that was concentrated in the ditch. Immediately after this obstruction was put in appellee complained of it to this street and alley committee of the city council, but appellant did nothing to remedy it.

The lot upon which appellee's dwelling was situate, in which he lived with his family, is adjacent to the ditch, at which point the ditch was about three feet deep. In a portion of the territory drained by this ditch are a number of livery stables, feed-yards and out-houses. During the month of July, 1895, a heavy rain fell, filling the ditch with water containing filth from these places, until it backed up into an alley south of appellee's premises and into his yard, remaining until it turned green, and finally dried up by evaporation and soaking into the ground. Appellee suffered this annoyance and inconvenience and several of his family were taken sick with typhoid fever.

The trial was by jury, who heard the evidence, and under an order of court viewed the premises. Verdict in favor of appellee for \$250, upon which the court rendered judgment.

Appellant contends that the third, fourth and fifth instructions given by the court, at the instance of appellee, are not supported by the evidence. We have carefully examined the evidence, and in our opinion it abundantly supports these instructions.

Appellant also contends that the testimony does not show that the contaminated and stagnant water caused the sickness complained of.

The inference from the whole testimony is irresistible that it did cause the sickness; but if it did not, the damages recovered are not excessive compensation for the annoyance and inconvenience suffered.

Appellee's sixth instruction concludes as follows:

"Even though the obstruction of said ditch which caused the flow of the water over plaintiff's premises, was made by the Illinois Central Railroad Company."

Appellant contends that this is not the law; that the city

is not responsible for damages resulting from the stopping up of the ditch by another.

The city collected this water together and carried it out of its natural course to the vicinity of appellee's premises, and it was its duty to furnish it an outlet. The city is not primarily liable for the stopping up of the ditch by the railroad company, but having notice that the railroad company had stopped it up, it is liable for not either causing the railroad company to remove the obstruction, or itself providing an escape for the water its ditches brought down upon appellee.

Appellant further contends that the city had a prescriptive right to carry this water through the ditch in that direction. The city had no prescriptive right, after notice, to allow the ditch to remain stopped up, and refuse to provide any other means of escape for the water it had collected and brought into proximity with appellee's premises.

The judgment of the Circuit Court is affirmed.

77	464
97	218

77	464
102	419

William R. Robeson v. Elmer Hutton et al.

1. **FREEHOLD—When Involved.**—In an action of trespass against the commissioners of highways who justify under the plea that the land was a public highway, from which the plaintiff had been duly notified to remove his fence and failed to do so, and that the defendants, as commissioners of highways, entered upon it and removed the fence for the purpose of opening the highway, etc., a freehold is involved and this court has no jurisdiction.

Trespass, *quare clausum fregit*. Appeal from the Circuit Court of Lawrence County; the Hon. EDMUND D. YOUNGBLOOD, Judge, presiding. Heard in this court at the February term, 1896. Dismissed for want of jurisdiction. Opinion filed August 31, 1896.

HUFFMAN & MESERVE, attorneys for appellant.

GEE & BARNES, attorneys for appellees.

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PER CURIAM.

This is an action of trespass, by appellant against appellees, for breaking and entering appellant's close, etc.

Appellees justify, under the plea, that the land was a public highway, from which appellant had been duly notified to remove his fence and had failed to do so; and that appellees, as commissioners of highways, had peaceably entered upon it and removed the fence for the purpose of opening the highway, as they were legally bound to do, etc.

This case involves a freehold, and this court has no jurisdiction to hear and determine it. The appeal should have been to the Supreme Court. *Mary Taylor v. A. L. Pierce et al.*, 174 Ill. 9; *James Chaplin v. Commissioners of Highways*, 126 Ill. 264; *Town of Brushy Mound v. McClintock*, 146 Ill. 643; *Village of Crete v. Fidelia L. Hewes et al.*, 168 Ill. 330.

The appeal is dismissed. Leave to appellant to withdraw records and files.

Frederick Wachtel, Adm'r, v. The East St. Louis & St. L. Electric Ry. Co.

1. *INSTRUCTIONS—As to Questions of Law.*—It is error in a civil case to submit a question of law to a jury; and to instruct them to determine whether an act was done in lawful manner, is in effect to submit to them a question of law.

2. *RAILROAD COMPANIES—Frightening Horses—Negligence.*—A railroad company is not liable for accidents arising from fright to horses by escaping steam or blowing the whistle in the usual operation of its road, if its agents are free from negligence.

Trespass on the Case.—Death from negligent act. Trial in the Circuit Court of St. Clair County; the Hon. ALONZO S. WILDERMAN, Judge, presiding. Verdict and judgment for defendant. Error by plaintiff. Heard in this court at the August term, 1897. Reversed and remanded. Opinion filed March 1, 1898.

B. H. CANBY and W. J. N. MOYERS, attorneys for plaintiff in error; JOHN W. NOBLE & SHIELDS, of counsel.

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MESSICK & RHODES, attorneys for defendant in error.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

Charles Burgdorf, plaintiff's intestate, was riding in a buggy driven by another person, along a descending approach to the eastern end of the St. Louis bridge. While so riding, the buggy was struck by a runaway team, following down the approach, whereby Burgdorf was thrown out, receiving injuries that caused his death. Defendant in error was operating an electric railway, whose track was parallel and close to the wagon track, upon which the team was moving. The declaration alleges in substance that when said team had turned onto said eastern approach, and commenced to descend, one of the cars of defendant was being driven along the track of defendant, in the rear of said team, and as said car approached the team, and when close to it, the motorman negligently commenced sounding the gong on the car, which, together with the noise and sight of the car, frightened the team, and that said motorman negligently continued to move said car and sound said gong, and that said team was thereby caused to become unmanageable, and to run down the said approach and into the buggy in which Charles Burgdorf was riding, with all due care and caution, overturning the buggy, throwing him out, and thereby causing his death.

Defendant in error pleaded the general issue.

This case has been tried twice. At the first trial, the jury found for plaintiff in error. Upon appeal the judgment was reversed for error in instructions. *E. St. L. & St. L. Electric St. Ry. Co. v. Wachtel*, 63 Ill. App. 181.

When the evidence is conflicting, as in this case, the instructions should be clear and accurate.

No instructions were asked by plaintiff. Five were given for defendant. To the giving of each, exception was taken and error assigned. The first is as follows:

"The jury is instructed that in determining whether the motorman or other servant of the defendant negligently or

carelessly drove the car or sounded the gong, the jury is to consider all the attending facts and circumstances, but are in no wise at liberty to presume negligence, at the time, of the defendant or its servants. The fact of negligence required affirmative proof; and the burden of showing that negligence, and that it primarily and necessarily produced the injury in question, rests with the plaintiff; and unless he so sustains this burden by a preponderance of the evidence he can not recover, and the jury will find for the defendant."

This instruction is criticised upon two-grounds: First, that it tells the jury that they have no right to presume negligence from the facts and circumstances proven; second, that telling them that negligence must be proven by affirmative proof is in effect telling them that it can not be inferred from facts and circumstances in proof. The instruction, as claimed by counsel, does not tell the jury that they can not presume negligence, meaning without proof, and this is the law. If this is so, it follows that negligence requires affirmative proof, and affirmative proof is made when facts and circumstances are proved from which negligence can be inferred. There is nothing in the instruction tending to mislead a juror upon this point. The second instruction is criticised upon the ground that it leaves to the jury to decide whether the defendant operated its road at the time and place "in a lawful manner."

It is error in a civil case to submit a question of law to a jury, and to instruct them to determine whether an act was done in a lawful manner, is in effect to submit to them a question of law. This instruction, however, when considered as a whole, explains to the jury the meaning of this phrase, as there used. The words "in lawful manner" were superfluous, and while they should not have been inserted, their use, considering their connection, is not reversible error.

Fourth instruction: "The jury is instructed that defendant's motorman had the right and it was his duty if he saw a team ahead of him on the approach, although not on the railway track, but right alongside of it, to keep his car

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moving, whatever sound might attend its operation, and to sound the gong and give notice to the person in charge of such team that the car was approaching, and that such action on the part of the motorman is not and can not by the jury be taken to be negligence, or want of ordinary care, and that a motorman under such circumstances had the right to assume that the sounding of the gong would not frighten a team ahead of him, and even if the movement of the car or the sounding of the gong did frighten a team and the motorman saw it, but the team was not evidently, and while the motorman could see it as his car moved along, so frightened as to be beyond the control of the driver, the motorman had still a right to proceed on his way with his car, and his doing so would not be negligence, nor could it be attributed to the want of ordinary care."

The jury are told by his instruction that it is the "duty of the motorman to keep his car moving whatever sound might attend that operation, and to sound the gong and give notice to the person in charge of the team that the car was approaching, and that such action by the motorman is not and can not by the jury be taken to be negligence or want of ordinary care." This invades the province of the jury, whose duty it is to say, under all the conditions, what is or is not negligence. The team on a traveled road, alongside the car tracks, is as rightfully on the road as the car is upon its tracks. The driver of a team may have knowledge that a car follows, and therefore need no notice. His horses may be frightened by its approach. They may be rapidly becoming unmanageable. The motorman may know all this, may know that no notice is necessary, and may believe that his continued approach and sounding the gong will cause the team to run away, with all the danger that attends a runaway in a city street. To say that under these circumstances it is his "duty to keep his car moving, whatever sound might attend that operation, and to sound the gong," and that "this is not and can not be taken as negligence or want of ordinary care," is a statement we can not indorse. It is not the law. *Ellis v. L. &*

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B. Ry. Co., 160 Mass. 341; Belk v. The People, 125 Ill. 589; Galesburg Electric M. P. Co. v. Manville, 61 Ill. App. 490.

A railroad company is not liable for accidents arising from fright to horses by escaping steam or blowing the whistle, in the usual operation of its road, if its agents are free from negligence, and what is negligence must be determined from the facts and circumstances in each case. I. B. & W. R. R. v. Schertz, 12 Ill. App. 304; L. & N. R. R. v. Upton, 18 Ill. App. 605; Shearman & Redfield on Negligence, Sec. 486.

The rule applies with all its force to street car companies when co-users with the public of public highways.

The latter part of this fourth instruction is also clearly erroneous. The jury by it are told that the motorman had a right to assume that the sounding of a gong would not frighten a team ahead of him, and if it did frighten the team and he saw it, and it was not evidently so frightened as to be or about to be unmanageable, that he still had the right to proceed on his way with the car, and his doing so would not be negligence, nor could it be attributed to the want of ordinary care.

This again directly invades the province of the jury. In doing so it conflicts with decisions of both the Supreme and the Appellate Courts. We cite only I. C. R. R. Co. v. Slater, 139 Ill. 199; L. N. A. & Co. Ry. Co. v. Patchen, 167 Ill. 204; East St. L. Elec. R. Co. v. Wachtel, 63 Ill. App. 386.

For error in this instruction the judgment is reversed and the case remanded.

**Charles Smith and Ada Smith v. Local Branch No. 714
of the Iron Hall of Mt. Carmel.**

1. **INSURANCE COMPANIES**—*Construction of the Statute Relating to Foreign Companies Doing Business in This State.*—The intent of the law requiring foreign insurance companies to comply with the terms imposed, as a condition for the right to do business in this State, is to

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protect citizens of the State from imposition by fraudulent and insolvent companies, and to facilitate collections for losses, without being compelled to go to other States to establish and secure them.

2. *SAME—To What Matters the Statute Regulating Foreign Companies Does Not Apply.*—The statute relating to foreign insurance companies doing business in this State has no relation to collateral matters that can not affect the insured one way or the other, and should not be held to embrace every act which an insurance company may find it convenient to do, as prohibited.

Mortgage Foreclosure.—Trial in the Circuit Court of Wabash County; the Hon. PRINCE A. PEARCE, Judge, presiding. Hearing and decree for complainant. Appeal by defendant. Heard in this court at the February term, 1898. Affirmed. Opinion filed September 9, 1898.

S. Z. LANDES, attorney for appellants.

MUNDY & ORGAN, attorneys for appellee.

MR. JUSTICE BIGELOW delivered the opinion of the court.

This suit is brought to foreclose a mortgage on real estate, executed by appellants to appellee, August 1, 1892, to secure the sum of \$300 of borrowed money, and due five years after date, with interest at six per cent. It contained a clause providing for the payment of reasonable solicitor's fees for foreclosing it.

The main defense is that the appellee is the agent of The Supreme Sitting of the Order of the Iron Hall, which is an insurance company, organized under the laws of the State of Indiana, located at Indianapolis in that State, and which had power under the law of its creation to establish local branches; and that because it did not comply with the law of this State, fixing the conditions on which it would be authorized to do business here, the mortgage is void and can not be enforced.

The minor defense relates only to the allowance of \$55 to complainant, as solicitor's fees, for foreclosing the mortgage, when there was no allegation in the bill that such a sum was a reasonable fee.

It was admitted that neither the Supreme Sitting Order, nor its local branch No. 714, ever complied with the law of

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this State, so as to entitle it, as a foreign corporation, to a legal right to do business here, if the law applied to it; but in the view we take of the case, it is unnecessary to inquire whether the law has any application to it or not; hence we express no opinion on the question as to whether appellee is such an insurance company as is exempt from the necessity of filing a copy of its charter with, and making a verified report of the various matters required by the statute to the State auditor, as a condition on which it could lawfully do business in this State, and shall assume appellant's contention that such a requirement was necessary to be correct, and that whatever business it did, should, in the language of the statute, "be deemed to be done in violation of the law." This brings us to the question, what kind of "business" does the law refer to, as having been done "in violation of law?" Does it mean every act the company may have done in this State, whether connected or disconnected with a contract for insurance? We so understand the contention of counsel for appellant, as his main point is expressed as follows: "It is contended on part of appellant * * * that it was unlawful for said Supreme Sitting, even in the name of its agent, the appellee, to take said note and mortgage, and therefore the same are uncollectible." A broader or more comprehensive answer to the question could not well be made. In support of his view of the matter, counsel cites *Cincinnati Mutual Health Assurance Co. v. Rosenthal*, 55 Ill. 85.

In that case the company entered into a contract with Rosenthal, insuring his health in the sum of twenty-five dollars for each week he might be prostrated by disease, for the term of five years, and also agreed to issue to him \$500 of its guaranteed capital stock, for all of which Rosenthal paid \$150 in cash, and gave the company his note for \$350 due on demand, to be paid subject to the call of the directors of the company. Suit was brought on the note, and as the company had not complied with the laws of this State, as a condition on which it could do insurance business here, the court held the note void.

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The note was given as well for the premium for the risk as for the stock, and therein the company was doing the business of "insurance," which was the thing it was prohibited from doing, without complying with the law. If the note had been given for the stock alone, the decision of the court might have been different from what it was, but since the sale of the stock and the contract of insurance constituted one transaction, and there was no way of telling what was agreed to be given for the stock alone, the whole contract became tainted with the illegal act of insuring Rosenthal, and hence could not be enforced.

We are unable to discover any analogy of that case to the case we are considering.

The intent of the law requiring foreign insurance companies to comply with the terms imposed, as a condition for the right to do business here, was to protect the citizens of the State from imposition by fraudulent and insolvent companies, and to facilitate collections for losses without being compelled to go to other States to establish and secure them; and each requirement of the law directly relates to acts of insurance or to something immediately growing out of the acts, and has no relation to collateral matters that can not affect the insured one way or the other, and in construing the law this fact should not be lost sight of, and a construction should be avoided, if possible, that will enable dishonest persons to retain moneys secured by methods scarcely better than a breach of trust.

The law should not be held to embrace every act which an insurance company may find it convenient to do, as prohibited. Suppose the Supreme Sitting Order of the Iron Hall had become possessed of personal property, and had sent it into this State and sold it, and taken the notes of purchasers for it; would the notes have been held void, if the order had been held such an insurance company as was prohibited from doing business in this State?

There was nothing morally wrong on the part of appellee in loaning the money to appellant Charles Smith, nor was there anything wrong on his part in borrowing it.

How appellee became possessed of the money is not a matter that can be inquired into here. If, in fact, the money had been won by gambling with other parties, still the contract of loaning it and taking a mortgage to secure it, would not have been tainted with the gambling acts.

There may be, and doubtless are, many thousands of dollars loaned in this State by foreign insurance companies, who have never actually issued a policy of insurance here, and who have never complied with the law so as to become entitled to do an insurance business in this State; and shall it be said that all such loans are illegal?

We are unable to see wherein the loaning of the money to appellant Charles Smith, and taking a mortgage to secure it, infringed upon any law of the State, and we must hold that it was not insurance business of the character which the statute declares "shall be deemed to be done in violation of law."

As to the point made by appellant's counsel in regard to the allowance of solicitor's fees—the mortgage secured them, the bill claimed them, the evidence showed they were reasonable, and we are unable to see how the court could have disallowed them without committing an error. Appellant Charles Smith claimed in his answer to hold a certificate of insurance for \$1,000 on his life, issued by the Supreme Sitting Order of the Iron Hall, dated July 28, 1890, and which matured and became payable under the laws of the order seven years after the date, and on which he claimed to have paid all the assessments made on him, and which he prayed might be set off against the mortgage, and making his answer a cross-bill he prayed for "such relief as to equity appertains," in case the court found that the order was such an insurance company as was not required to report to the auditor of State in order to legally do business in this State. The evidence failed to show all assessments had been paid, but it showed the reverse, and that, under the laws of the order, the certificate had not become payable.

We find no error in the record, and the decree is affirmed.

Illinois Central Railroad Co. v. Jacob Keller, Appellee.

1. **NEGLIGENCE—Running Trains at a Rate of Speed Prohibited.**—The fact as to whether a train was run at a rate of speed prohibited by an ordinance is for the determination of the jury.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of St. Clair County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the August term, 1897. Affirmed. Opinion filed March 1, 1898.

G. A. KOERNER and VICTOR K. KOERNER, attorneys for appellant.

FRED B. MEERRILLS and ROBERT A. MOONEYHAM, attorneys for appellee.

MR. PRESIDING JUSTICE CREIGHTON delivered the opinion of the court.

This was an action on the case by appellee against appellant to recover damages for a personal injury, commenced and prosecuted to judgment in the Circuit Court of St. Clair County. The trial was by jury. Verdict for appellee for \$750. Appellant brings the case to this court and urges as grounds for reversal:

That the court gave at the instance of appellee improper instructions; that the verdict is against the evidence, and that the verdict is excessive.

The declaration charges the defendant with running its train in a manner prohibited by two ordinances of the city of Belleville. One prohibiting freight trains from running within the city limits at a greater rate of speed than six miles an hour, the other requiring a bell on the engine to be kept continuously ringing while moving a train within the city. The plea was not guilty.

A carload of grapes had been consigned to one Christ Meiser, and upon reaching its destination in the city of

Belleville was switched onto a side track north of the main track and fifteen feet distant from it. There was another side track immediately north of the one on which Meiser's car stood, but it was occupied by a line of box cars standing so close as not to leave room to reach his car from that side. Appellee went with Meiser to assist him in unloading the car, they taking for that purpose a one-horse wagon. On arriving at the railroad yards an employe of appellant pointed out to them Meiser's car, which was accessible only from the side next to the main track, and so they drove the wagon into the open space between the car and the main track and proceeded with their work, Meiser standing in the car handing out the baskets of grapes, and appellee standing in the wagon placing them. The horse was not tied; the lines hung loose in the wagon. While thus situate a freight train of appellant passed on the main track and appellee's horse took fright at the train and became unmanageable. In trying to control the horse appellee jumped out of the wagon, taking hold of the halter strap near the bits. In the struggle with his horse he was thrown against the side of the moving train, knocked down, and holding onto his horse was by it dragged over a crossing. He was quite seriously injured, had three or four ribs broken, his hips and legs bruised, ankle lamed, hurt in his side and back and was "spitting blood." He was confined to his bed from these injuries six weeks, and still suffering pain at time of the trial. His business was that of a blacksmith, and he could earn \$3.50 to \$4 per day when he worked at his trade.

There is no material error in the instructions given for appellee. Upon the whole case the jury was fully and fairly instructed.

As to whether or not appellee was in the exercise of due care and caution, in addition to what is disclosed above, the evidence shows that the horse was gentle, and that appellee was accustomed to drive horses. As to speed of the train, the estimates of the witnesses range from twenty miles an hour down to three miles an hour, and there is also a con-

flict of testimony as to whether the bell was kept continuously ringing or not. All these questions, together with that as to the cause of the injury and the amount of damages sustained by appellee, were properly and fairly submitted to the jury, and we find in this record no sufficient reason for disturbing the verdict.

The judgment of the Circuit Court is affirmed.

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American Express Co. v. Harry Risley.

1. **FELLOW-SERVANTS—Who Are, a Question of Fact.**—Whether an employe of a railroad company, being both baggage master on the train and express messenger in charge of the baggage car, was a fellow-servant of a brakeman, is a question of fact to be determined by the jury, under instructions by the court as to the law relating to fellow-servants.

2. **VARIANCES—Must Be Specially Pointed Out.**—An objection on account of variance must point out what the variance is.

3. **NEGLIGENCE—May Be the Proximate, Where it is Not the Immediate, Cause of an Injury.**—Negligence may be the proximate cause of an injury of which it is not the immediate cause. If the defendant's negligence concurs with some other event (other than the plaintiff's fault) to produce the plaintiff's injury, so that it clearly appears that but for such negligence the injury would not have happened, and both circumstances are closely connected with the injury in the order of events, the defendant is responsible, even though his negligent act was not the nearest cause in the order of time.

4. **PROXIMATE CAUSES—The General Rule.**—The general rule is that a man is answerable for the consequences of a fault which are natural and probable; but if his fault happened to concur with something extraordinary and unforeseen he will not be liable.

5. **SAME—Requisites of a Finding.**—In order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of injury, it must appear that the injury was the natural and probable consequence of the negligent or wrongful act, and that it might have been foreseen in the light of the attending circumstances.

6. **SAME—Defined by Judicial Decisions.**—A long series of judicial decisions have defined proximate, or immediate and direct damage to be the ordinary and natural results of negligence, such as are usual and therefore might have been expected.

7. **SAME—Where the Negligence of the Defendant Was the Effective**

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Cause of the Injury.—When the injury is the result of negligence of the defendant and that of a third person, or of the defendant and an inanimate thing, the plaintiff may recover if the negligence of the defendant was an effective cause of the injury.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Wabash County; the Hon. PRINCE A. PEARCE, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the February term, 1898. Affirmed. Opinion filed August 31, 1898.

STATEMENT.

This is an action brought by appellee against appellant for the recovery of damages alleged to have been caused by the negligence of appellant's servants. Judgment for appellee for \$1,486.

The declaration alleges in substance that on the 13th day of July, 1897, plaintiff was a brakeman on train No. 2 of the C., C., C. & St. L. Railway. That after said train had discharged its passengers at Vincennes, and crossed the track of the B. & O. Railroad at that city, preparatory to transferring express matter of appellant from said train No. 2 to the E. & T. H. Railroad train No. 4, going north, the plaintiff, as was required of, and was necessary for him to do, was standing in the door of the baggage car of said train No. 2, for the purpose of "spotting" or seeing that baggage cars on said C., C., C. & St. L. train No. 2 and the E. & T. H. train No. 4 should be stopped with their doors opposite, so that expressage on said train No. 2 could be transferred to the express car on train No. 4, and that while the plaintiff, with due care and diligence for his safety, was there performing his duties as brakeman, the defendant, by its servants, whose duty and custom it was to come on plaintiff's train upon its arrival, for the purpose of handling and transferring defendant's express matter, came to the express car of said train No. 2, in which plaintiff was so engaged, for the purpose of transferring defendant's express matter from said train No. 2 to the E. & T. H. train, and did so carelessly and improperly manage and handle a "chute," or trough, used by defendant's servants in so transferring

express matter, that said chute, which was made of boards and very heavy, and about fourteen feet long, was by the careless and improper handling of said servants, allowed to protrude at great and unnecessary length from the east side of said baggage car, causing it to strike a coal car on the track of the Indianapolis & Vincennes Railroad, and thereby causing the west end of the said chute to be suddenly and violently thrown against plaintiff, forcing him against the side of the doorway of the baggage car, whereby he was greatly injured, etc.

It appears from the evidence that a part of the baggage car, in which plaintiff was injured, was also used as an express car by appellant, its express matter being in charge of Everett Gould, who also received and delivered baggage; that at the time of the accident there was a large amount of express matter to be transferred, estimated to be about 8,000 pounds, consisting chiefly of fruit in boxes and crates, and three coops of chickens, piled around ready to be transferred. It was the custom, after discharging passengers and baggage at the depot, to move the train up to where train No. 2 stood, and to stop so that the doors of the baggage car on each train should be opposite. On the evening in question it was the appellee's duty to signal the engineer of train No. 2 when to start from the depot, and when to stop for the transfer of the express matter. It was customary for employes of appellant to put in the baggage car, lengthwise, a "chute," or heavy trough about fourteen feet long, eighteen inches wide and six inches high, to be used in transferring express matter from one car to the other. While no one testifies to having seen them put it in the car on the evening in question, there is evidence that four of appellant's servants brought it to the door of the car, and that they usually put it in the car lengthwise, and that they got in the car to go to the place of transfer. On this evening it was put in crosswise, one end protruding four or five feet from the east door of the baggage car, and the other end being in the west door of the car. The car was between eight and nine feet wide. Appellee, upon the order of the

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conductor to pull the train up, testifies that he called to the employes of appellant, who were doing some work around the express car, "How are you fixed there, boys?" and that some one of the four, he don't know which one, replied, "All right, let her go." That he then signaled with his lantern to the engineer to start, and came in the car and took his stand in the west door, so as to signal for a stop, when the doors of the cars were "spotted," or opposite each other. That he did not see the "chute," although he must have stepped over it, and that while standing in the door, the projecting end of the chute on the east side struck a coal car standing on a side track, thereby knocking the east end back, which forced the west end forward, striking and pinning him against the side of the door and thereby injuring him.

S. Z. LANDES, attorney for appellant.

BELL & RISLEY and E. B. GREEN, attorneys for appellee.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

Several reasons are urged by appellant why the judgment should be reversed. It is strongly urged that appellee must have seen the "chute" crosswise in the car when he stepped over it, and was therefore not in the exercise of ordinary care. This was a question for the jury. Appellee testifies positively that he did not see it. The evidence shows that there were chicken coops, boxes and crates of fruit on the floor of the car, in some confusion, being arranged for transfer. That during the short distance the train was to be moved, appellee was charged with the duty of watching when the doors of the trains were opposite, and of signaling when to stop. Under these conditions, with his attention specially directed to a specific duty, we can not say that he must have seen the "chute," and that the jury was mistaken in finding that he was in the exercise of ordinary care.

It is urged that Gould, being both baggage master on the train and express messenger in charge of the baggage car, was a fellow-servant of appellee. This is a question of fact to be determined by the jury, under instructions by the court as to the law relating to fellow-servants. As the question was not raised in the trial court, there has been no consideration of it by the jury, and it is not before us now for review. It is urged that there is a variance between the allegations of the declaration and the proof; that the evidence does not sustain the cause of action alleged in the declaration; and that the court erred in not withdrawing the case from the jury upon the motions of appellant, made at the conclusion of plaintiff's testimony, and also at the conclusion of the testimony in the case.

The negligence charged against appellant is in substance, that while the appellee was standing in the doorway of the baggage car for the purpose of seeing that it should be stopped opposite a door of another baggage car, appellants so carelessly managed and handled a "chute" that it was allowed to protrude from the east side of the baggage car, causing it to strike a coal car, and thereby causing the west end of the "chute" to strike appellee.

An objection on account of variance must point out what the variance is. *St. Clair Co. Ben. Soc. v. Fietsman*, 97 Ill. 474; *Start v. Moran*, 27 Ill. App. 119.

The objection first made by appellant occurred following this testimony of appellee: After describing the pulling up of the car after leaving the depot, and what he did, he said (we quote from the abstract) "the chute was sticking out four or five feet."

Question by Landes, counsel for appellant:

"How long had the chute been lying in that position at the time you gave the signal?"

A. "It had been lying there from the time it was put in until it struck me."

Question by Risley, counsel for appellee:

"Was it lying there from the time the train left the station south of the B. & O. S. W. crossing till the time

you arrived at the place where you were giving the signal you just spoke of?"

A. "I can't say about that. We were within forty feet of where we were to stop. I gave the signal to go ahead a little. This end of the trough was sticking out here on this side, and there was a car of coal on the side track there. It struck that car on the east side. I was standing on the west side of the car in this door over here."

Landes: "We desire at this point to enter an objection. The plaintiff must make out his case by his declaration. This declaration charges that the injury was the result of the negligence of the servants of the defendant."

The objection was overruled and appellant excepted.

There was no error in this ruling. The objection was general in its character. The witness had before testified as to the "chute," and its placing in the car by the servants of appellant, and his testimony, when objection was made, was explanatory of how, by such placing, the injury was caused.

Appellee proceeded to testify:

"As I was saying, when I looked out and saw we were within about forty feet of where I wanted to stop, and gave the signal to move ahead a little, this "chute" that was protruding from the east side of the car, struck the car of coal on the side track, and caused the end to fly round in the door that I was standing in—like a seat board across a wagon box, you men all know, sticking over one side when it strikes an obstruction, it will cause the other end to fly forward—and then it pinned me up to the side of the door jamb. The end that struck the coal car flew back, making the other end fly forward, striking my feet and pinning me to the door jamb."

Landis: "I now desire to renew my objection to this evidence as not the case made out by the declaration. It charges specifically that he came on the car for the purpose of discharging express matter; and by his testimony he put in motion the force that caused his injury."

Objection overruled and exception.

The declaration states in substance that plaintiff was standing, as was necessary for and was required of him to do, in the doorway of the baggage car of said C., C., C. & St. L. train No. 2 for the purpose of "spotting" or seeing that the baggage cars on said C., C., C. & St. L. train No. 2 and the E. & T. H. train No. 4 should be stopped with their doors even for the purpose of, and in order that the expressage from said train No. 2 could be conveniently and expeditiously transferred to the express car of said train No. 4; and that while the plaintiff * * * was then and there performing his duties as passenger brakeman, the defendant, by its servants, * * * had come to the express car of said train No. 2, for the purpose of discharging and transferring defendant's express matter from said train No. 2 to said train No. 4, and did so carelessly and improperly manage and handle a "chute," used by defendant's servants for transferring express matter from the C., C., C. & St. L. trains to the E. & T. H. trains, that it was allowed to protrude at great length from the east side of the car, causing it to strike a car on the track of the I. & V. railroad, and thereby causing the west end of said chute to be thrown against plaintiff, etc. The objection, then, that "the declaration specifically charges that plaintiff came on the car for the purpose of discharging express matter," is not tenable, as no such specific charge is made. The latter part of the objection is, that by appellee's testimony, "he put in motion the force that caused the injury himself." This seems to be the alleged variance most strongly insisted upon by appellant. In other words, it is claimed by appellant that the proximate cause of the accident was the progressive motion of the train put in motion by the signal of appellee, and not the protrusion of the chute in question.

Three causes concurred in producing the injury to appellee, viz.: the motion of the train; the coal car on the side track; and the placing of the "chute" crosswise in the car, so as to protrude from the east side thereof.

It appears from the evidence that the movement of the train was the usual movement at this place for the transfer

of express matter. There is no evidence as to whether the standing of a coal car on the side track was a usual or an unusual circumstance. It is a matter of common experience that cars are very frequently left standing on side tracks, especially in or near villages and cities. It is also in evidence that the placing of the chute crosswise in the car was an unusual condition, and this is the negligence charged against appellant. When the chute was placed in the car, the servants of appellant riding in the car with it knew that it was to be carried to the place of transfer, and if they put it in the car must have known that it extended out from its side. It is fair to presume that the express agent of appellant, with the other servants of appellant located at Vincennes, knew of the surroundings of the depot at that place, and of the location there of the side tracks. These were proper matters for the jury to consider in passing upon the question of appellant's alleged negligence, and as to whether it was the proximate cause of the injury to appellee. If it was negligence under the circumstances to locate the chute as it was located when put in the car, it was continuing negligence to leave it in that location. If, when so placed, under the attendant conditions, it was not unlikely that the end of the chute would strike some obstacle when the car was put in motion, and it did so strike, then such placing and continued location was a proximate cause.

It is said in *Shearman & Redfield on Neg.*, Sec. 10, 3d Ed.:

"Negligence may, however, be the proximate cause of the injury of which it is not the sole or immediate cause. If the defendant's negligence concurred with some other event, other than the plaintiff's fault, to produce the plaintiff's injury, so that it clearly appears that but for such negligence the injury would not have happened, and both circumstances are closely connected with the injury in the order of events, the defendant is responsible, even though his negligent act was not the nearest cause in the order of time. * * *

"The practical construction of 'proximate cause' by the courts is a cause from which a man of ordinary experience

and sagacity could foresee that the result might probably follow."

Under this definition of "proximate cause," the proof fitted the declaration, although appellee may have signaled the train to move.

It is said in *McGrew v. Stone*, 53 Penn. 436 :

"The general rule is that a man is answerable for the consequences of a fault which are natural and probable; but if his fault happened to concur with something extraordinary and unforeseen, he will not be liable."

It was not unforeseen in the case at bar that the train would be moved just as it was moved; and it was not extraordinary that a chute, protruding four feet from a car door, might strike a car standing on an adjacent parallel side track.

The following cases state the law as to proximate cause as favorably for appellant as the tenor of the decisions warrants: "It is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it might have been foreseen in the light of the attending circumstances." *Milwaukee R. Co. v. Kellogg*, 94 U. S. 469.

"A long series of judicial decisions has defined proximate or immediate and direct damages to be ordinary and natural results of the negligence, such as are usual, and therefore might have been expected." *Henry v. S. P. R. R. Co.*, 50 Cal. 183.

In *Pullman Car Co. v. Laack*, 143 Ill. 261, the court say : "It is well settled that when the injury is the result of negligence of the defendant and that of a third person, or of the defendant and an inevitable accident, or an inanimate thing has contributed with the negligence of defendant to cause the injury, the plaintiff may recover if the negligence of the defendant was an effective cause of the injury.

This further limitation is stated in the above case: "If it could have been foreseen, by the exercise of ordinary care,

that injury might or would result from the negligence." P. 260.

Tested by these cases, the declaration alleged negligence that under the proof was properly submitted to the jury. It was for them to say whether the result that happened was an ordinary and natural result that might have been reasonably foreseen, considering all the circumstances of the case.

In the light of the authorities quoted, we think there was no substantial variance; that the evidence tends to support the allegations of the declaration; that issues were presented that were proper to be submitted to the jury, and that the court did not err in refusing to instruct the jury to find for defendant.

Appellant urges that the court erred in sustaining an objection to this question asked of H. T. Kuhlmeier, express agent, who was in the baggage car.

Q. "I will ask you if a man of ordinary intelligence, good eyes and ears, could have stepped across that 'chute' without knowing it was there?"

The objection was properly sustained. It called for a conclusion of the witness. It was for the jury, from a description of the situation and circumstances, and the testimony in the case, to draw the conclusion, and not the witness.

The first instruction for appellee is objected to, upon the ground that it does not restrict the jury to the negligent acts charged in the declaration. As the only negligent act charged and sought to be proved was the improper placing of the chute, there is no reversible error in the instruction. Nor is the objection valid that the jury "could find by it justification in finding for appellee, although it affirmatively appears he knew of the danger and unnecessarily went into it."

The instruction states an abstract proposition of law, and in this respect is not to be commended. But it is not open to the last objection named, and besides, the jury was told by appellant's instructions, that the plaintiff must

affirmatively show by a preponderance of the evidence that he was in the exercise of due care; and if he did not, that the verdict should be for defendant.

We find no error in the second and third instructions.

The fourth might have been more definite, but it is not misleading. The employment of the servants of appellant from the time of their bringing the chute and entering the baggage car, was the transfer of express matter. What they did antecedent to the actual transfer, was in view of and preparatory to the transfer.

The fifth instruction is not bad. It limits a recovery of damages to the issue, "if the jury shall find the plaintiff has been injured as charged in the declaration." This is not a limitation, as appellant contends, to the described injuries, however received, but it is also a limitation to the causation of the injuries as described in the declaration.

The instructions asked by appellant and refused were properly refused. What we have said, *supra*, in reference to proximate negligence, suggests reasons why all but the eighth should be refused. The eighth, in effect, tells the jury that if they believe that appellee knew the chute lay across the car, they should find for the defendant.

This invades the province of the jury. It was for the jury, and not the court, to say whether such knowledge constituted contributory negligence. Judgment affirmed.

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The Lebanon Coal & Machine Association v. Louis Zerwick, Adm'r.

1. INSTRUCTIONS—*Must be Limited to the Negligence Charged.*—It is error to give an instruction which is not limited to the negligence charged in the declaration.

2. SAME—*Erroneous Instructions Will Not Always Reverse.*—Where it is apparent from the evidence that a verdict could not, in reason, have been otherwise than the one returned, and where upon the whole case substantial justice has been done, erroneous instructions will not reverse.

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3. *SAME—Where Some Instructions are Erroneous and Others State Law Correctly.*—Where some of the instructions are erroneous, and others state the law correctly, and the verdict returned is strongly supported by the evidence, and clearly right and just, the presumption prevails that the jury was not misled as to the law of the case.

4. *INFERENCES—From the Omission to Call a Witness.*—In a suit to recover damages for personal injuries, the omission, unexplained, to call as a witness the only person who was actually present, furnishes just ground for inference unfavorable to the plaintiff.

5. *FELLOW-SERVANTS—Must be Determined from a Consideration of All the Evidence in the Case.*—Whether or not two persons are fellow-servants must be determined from a consideration of all the evidence in the case concerning the respective duties performed by them, and their relations to the business generally and toward each other in the performance of such duties.

6. *SAME—Scope of the Inquiry.*—The inquiry as to whether a deceased person was a fellow-servant of the person whose negligence caused his death, should not be limited to the evidence of what the deceased did at the immediate time of receiving the injury.

7. *SAME—Evidence Showing the Relation to Other Servants, Competent.*—Testimony which tends to disclose the general course of business, and the true relation existing among the different members of the gang of workmen, is competent upon the question as to who are fellow-servants.

Trespass on the Case.—Death from negligent act. Trial in the Circuit Court of St. Clair County; the Hon. WILLIAM HARTZELL, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the February term, 1898. Reversed and remanded. Opinion filed August 31, 1898.

WISE & McNULTY, attorneys for appellant.

MERRILLS & MOONEYHAM, attorneys for appellee; T. M. MOONEYHAM, of counsel.

MR. PRESIDING JUSTICE CREIGHTON delivered the opinion of the court.

This was a suit in the Circuit Court of St. Clair County, by appellee against appellant, to recover damages for the death of appellee's intestate resulting from an injury received while engaged in loading coal, in the service of appellant in its mine.

Trial was by jury. Verdict and judgment in favor of

appellee for \$750. The declaration upon which the case was tried contains two counts.

The first charges that it was the duty of defendant to furnish deceased a reasonably safe place in which to perform the duties of his employment, and to use ordinary care to keep such place in a reasonably safe condition; that defendant disregarded its duty in that behalf by negligently permitting a large amount of slate, dirt, rock and shale to overhang in a loose and dangerous condition the place where deceased was required to work; that defendant had full knowledge of the dangerous condition, or by the exercise of ordinary diligence might have had such knowledge, and that deceased had no knowledge of such dangerous condition.

The second count charges same as the first, and in addition, that it was the duty of defendant to secure the overhanging substance and make it reasonably safe by setting thereunder a sufficient number of mine props, or by removing the same from the roof of the mine, and that defendant negligently failed to set sufficient props, and also negligently failed to remove the overhanging substance.

Appellant assigns many errors, but argues only that the court erred in giving first, fourth, fifth and sixth instructions at instance of appellee and in refusing one instruction asked by appellant; in admitting improper evidence on behalf of appellee, and excluding proper evidence offered by appellant; that the verdict is excessive and that the evidence as to each and all the material issues is not sufficient to support the verdict.

The first instruction is not limited to the negligence charged in the declaration, and therefore in giving it to the jury the court erred. *Consolidated Coal Co. v. Young*, 24 Ill. App. 255; *C. & A. R. R. Co. v. Mock*, 72 Ill. 141.

The fourth instruction is: "You are further instructed not to draw any inferences or conclusions unfavorable to the plaintiff from the fact that Marion Aggles was not called as a witness."

Marion Aggles was a brother of the deceased; was work-

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ing with him at the time of the injury, and was the only person who was actually present. He was not called as a witness and the record discloses no reason why he was not called. This unexplained fact furnished just ground for inference unfavorable to plaintiff.

The court erred in giving the fourth instruction. Consolidated Coal Co. v. Scheiber, 167 Ill. 539.

Appellant's objection to the fifth instruction is not well taken. The testimony tends to show that the timber-man knew all that any one knew about the condition of the roof of the mine. It also tends to show that the timber-man sustained such relation to the mine and its operation that notice to him would be notice to appellant.

The sixth instruction given for appellee is as follows:

"In order to constitute servants of the same master 'fellow-servants,' within the rule which relieves the master from responsibility for the negligence of a fellow-servant, it is essential that the servants shall be, at the time of the injury, directly co-operating with each other in the particular business in hand, or that their mutual duties shall bring them into habitual consociation, so that they may exercise an influence upon each other promotive of proper caution."

To one taking a comprehensive view of the whole situation, as shown by the evidence, the instruction would be a substantially correct statement of the law. The expression, "It is essential that the servants shall, at the time of the injury, directly co-operate with each other, in the particular business in hand," is susceptible of being understood and applied by a jury in a sense much too limited. They might be fellow-servants and one of them not be present at all at the immediate time of the injury. They might be fellow-servants and one of them not take any direct part in the particular detail of the business involved in the mere physical act of lifting the coal onto the cars.

The expression, "at the time of the injury," has been criticised by the Supreme Court, as limiting the time too narrowly in cases where negligence and due care, on the occasion of an injury, were controlling issues. In one case, C. M. & St. P. Ry. Co. v. Halsey, 133 Ill. 248, the judg-

ment was reversed on the ground alone that one of the instructions contained the expression, "as to the conduct of the deceased at the time of the accident," the court saying: "This was clearly erroneous and calculated to mislead the jury;" holding that the inquiry should not have been limited to the evidence of what the deceased did at the immediate time of receiving the injury. Whether or not two persons are fellow-servants must be determined from a consideration of all the evidence concerning the respective duties performed by them, and their respective relations to the business generally and toward each other, in the performance of their respective duties.

The language of the instruction is from the opinion of the court in *C. & A. R. R. Co. v. Kelley*, 127 Ill. 637. That language is part of a general statement of the law, and not an approved instruction for the guidance of a jury in applying the law to the facts of a particular case.

Appellant complains of the refusal of the court of the following instruction:

"If you believe from the evidence that the deceased, and the person whose duty it was to set timbers or props to hold up the roof of the mine in question, were working for the defendant coal company, and that both were directly co-operating with each other in the business of the company in getting out coal for the company, and that both were necessary to carry on this business, or that their respective duties were such as to bring them into habitual association with each other, so that they might exercise mutual influence upon each other, promotive of proper caution for each other's safety, then they were what the law calls fellow-servants with the same master; and if you believe from the evidence that the plaintiff was injured because the said timber-man, or person whose duty it was to timber or prop the roof of the room in question, neglected his duty, the defendant is not liable in this case."

This instruction correctly states the law concerning fellow-servants as applicable to the facts, as the evidence tends to show them to be in this case, but the concluding part of the instruction is erroneous. It assumes that the timber-

Lebanon Coal & Machine Ass'n v. Zerwick.

man was, in fact, a fellow-servant with deceased; or it is, at least, clearly misleading in that respect. As a whole, it was properly refused by the court.

Appellee contends that the error complained of in the first instruction is cured by two certain instructions given at the request of appellant, in which the law is correctly stated. Where it is apparent from the evidence that a verdict could not in reason have been otherwise than the one returned, and where upon the whole case substantial justice has been done, erroneous instructions will not reverse; and where one or more of the instructions are erroneous, and others state the law correctly, and the verdict returned is strongly supported by the evidence, and clearly right and just, the presumption usually prevails that, upon the whole, the jury was not misled as to the law; but in a close case, where there is grave doubt whether substantial justice has been done, each instruction should state the law correctly or there should be a reversal. This case falls clearly within that class of cases. *Village of Warren v. Wright*, 3 Ill. App. 602; *C. & A. R. R. Co. v. Murray*, 62 Ill. 326; *Baldwin v. Killian*, 63 Ill. 550; *I. C. R. R. Co. v. Maffit*, 67 Ill. 431; *W. St. L. & P. Ry. Co. v. Rector*, 104 Ill. 296.

During the trial the witness Mowe testified concerning the manner in which the "gang" worked together, the timber-man and deceased being two of the gang; and on cross-examination appellant asked concerning the manner in which the gang were paid, and if the pay of all was not based on the number of boxes filled by the loaders.

The court refused to admit the witness to answer.

Appellant also sought to prove how often the timber-man, in the ordinary course of performing his duty, usually came into the room where the loaders were at work. The court refused to admit this testimony, confining this inquiry to the day of the injury.

The court erred in both instances. This testimony was competent. It would have tended more fully to disclose the general course of business, and the true relation existing among the different members of the gang.

With the view of the case we entertain, it is not necessary to discuss the amount of the verdict.

The case must be reversed, and as we have decided to remand it, we deem it both unprofitable and unwise to discuss the evidence.

The judgment of the Circuit Court is reversed and the case remanded.

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The Chicago & Alton Railroad Co. v. F. C. Smith, Adm.

1. **NEGLIGENCE—Running Trains at a Speed Prohibited—Presumptions.**—Where an injury has been done to a person or property in consequence of running a train in an incorporated city, town or village at a greater rate of speed than is permitted by the ordinances of such city, town or village, under paragraph 87 of chapter 114 R. S. (Hurd's Stat. 1897), such injury must be presumed to have been inflicted by the negligence of the railroad company or the agent operating such train.

2. **SAME—Rebuttal of the Presumption—Prima Facie Case.**—Where the fact that a train was running at a rate of speed prohibited by an ordinance is established, the presumption created by virtue of the statute, that the death was caused by the negligence of the company running such train, and is to be rebutted by the defendant.

8. **ADMINISTRATION—Letters of, May be Granted to Non-Residents.**—For the purpose of suing for damages occasioned by death from negligence, an administrator may be appointed in the State where the cause of action accrued, with the right to sue in the State.

Trespass on the Case.—Death from negligent act. Trial in the Circuit Court of Madison County; the Hon. MARTIN W. SCHAEFFER, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the February term, 1898. Affirmed. Opinion filed August 31, 1898.

WISE & McNULTY, attorneys for appellant.

M. MILLARD, attorney for appellee.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

Action by administrator for causing death of deceased.

Four counts in declaration, charging respectively that the train was carelessly run and driven; that no bell was rung or whistle sounded; that an ordinance of the village of Madison prohibited a speed greater than ten miles an hour, and that appellant's train was driven over a highway crossing within the limits of said village at a greater speed than ten miles; and that the space between a rail of appellant's track and a plank on the crossing was too wide, and that in consequence thereof, the foot of deceased was caught in the space, and he was thereby held and killed. All counts averred due care on part of deceased. Plea of not guilty. Verdict and judgment for appellee for \$1,000.

Appellant's track crosses a highway in the village of Madison, leading west from the village toward the Mississippi river. At the point of crossing, the track is higher than the surrounding surface, and overlooks low ground between it and the river. At the crossing there are six railroad tracks commencing at the west, and being in order as follows: Chicago & Alton, Big Four side track, Big Four main track, Big Four side track, Wabash main track, and Wabash side track. Distances, from the east rail of the Alton track to the west rail of the first Big Four side track, seven feet, five inches; from the east rail of this side track to the west rail of the Big Four main track, seven feet, seven inches; from the Big Four main track to the Big Four east side track, eight feet, four inches; from this track to the Wabash main track, fifty-two feet, six inches.

Deceased resided in St. Louis and had no property in this State. Letters of administration were issued to appellee by the County Court of St. Clair County, Illinois.

It is in evidence that at the crossing the highway was planked, and that the space between the plank and the rails when put down, was two and one-half inches, which had been left for the flanges of the locomotives and car wheels to run in; that the space had been worn by the flanges of the wheels to two and seven-eighths inches at the west rail where deceased was killed.

The disputed facts in the case are, was the bell rung and

the whistle sounded; and was the deceased in the exercise of reasonable care at the time of the accident. The evidence shows that appellant's train was a passenger train, and was running at from thirty-five to forty miles an hour, while an ordinance prohibited a speed in excess of ten miles an hour. As to the bell and whistle, the testimony, while conflicting, tends to prove that both were sounded. The real issue in the case is, was the deceased in the exercise of reasonable care. The jury by their verdict say that he was. An examination of the evidence does not warrant us in saying that he was not.

The circumstances of the accident appear from the evidence to have been as follows:

Morris Rodgers, the deceased, living in St. Louis, on the Sunday of his death, came to the house of one Devaney, in Madison, to see his son who worked for Devaney. His son was not at Devaney's, but was fishing somewhere in the bottom between the railroad highway crossing and the river. Rodgers, in company with a lad, Lawrence Benson, about nine years old, left Devaney's and came to the highway crossing, where he stopped, while the lad went down in the bottom to find his son. Not finding him, the lad came back to the crossing and reported. They were standing on or near the space between the Big Four west side track and the Big Four main track. While there talking, a freight train outward bound, was seen coming up on the Big Four main track. To avoid this train they started west to cross appellant's track. While doing so they saw appellant's train, inward bound, coming down in the opposite direction to the Big Four freight train. The space between the nearest rails of the Big Four main track and appellant's track is about fifteen feet, so that the space between trains meeting and passing at the crossing would be, taking into account the projection of the cars over the rails, from ten to twelve feet. In crossing appellant's track, the testimony strongly tends to show that one of the deceased's feet was caught in the space between the west rail of the track and the plank of the crossing. He struggled to free himself and shoved the boy over the track out of the way of the locomotive, but

being unable to free himself, he was struck by it and killed. The testimony shows an indentation on the heel of one of his boots and the heel and sole partially torn off. The engineer and fireman on appellant's locomotive saw the man and boy when attempting to cross the track, and describe them as "squabbling," or "tussling," or as stated by one of them, that the "man seemed to be trying to hold the boy."

The engineer testifies: "As the train came around in sight of the crossing, I noticed a Big Four freight train going north. That was as I came around the curve. I at once, knowing there was a crossing there, began to look out for people coming on the track, so as to prevent striking anybody or having any trouble. When I came in sight of the crossing, I saw a man and boy standing on the road crossing on the track of the Chicago & Alton road. I gave the danger signal and applied the air brake. It attracted the attention of the boy and he notified the man. * * * When I saw they knew the train was coming I released my brakes for a minute, for I had been giving the danger signal, and the boy started to get off, but the man was holding to him. The boy tore loose and got off the track. The man and boy were on the east side of the track. He got over to the west railing and was in a leaning position when I struck him. * * * The man did not seem to make any effort to get off the track. He made no attempt whatever. * * * When I saw the man wasn't going to get out of the way, I threw the brake on again. I should judge the engine was then about seventy-five feet away when I made up my mind the man wasn't going to get off. * * * Running at the rate of thirty miles an hour, I think I could stop that train in 500 feet. Running at the rate of ten miles an hour, I could probably stop that train in thirty feet. I saw the man and boy on the crossing just as I came around the curve, about 1,200 feet away."

If this testimony "that the man made no attempt whatever" to get off the track was true, appellee should not have recovered. The jury evidently did not believe that it was true, and neither do we. The testimony of the engineer and fireman tends to prove suicide on the part of the

deceased, coupled with an attempt to cause the death of the boy by holding him until the engine should strike him. The jury evidently, and we think rightly, discredited their conclusions, and believed the "squabbling" and "tussling" as they termed it, to have been the desperate effort of the man to save himself and the boy.

Appellant insists that the deceased was guilty of contributory negligence in attempting to cross its tracks, seeing that its train was approaching. This was for the jury to determine under all the circumstances of the case. The jury doubtless concluded that a prudent man would not care to stand on a space, ten or twelve feet wide, between two trains passing in opposite directions. There was, too, ample time to cross appellant's track, if appellant's train had been running ten miles an hour. There was time to have crossed it running thirty-five miles an hour, if deceased's foot had not caught in the space between the rail and the plank of the crossing. This is shown by the fact that the boy got over safely. Under these conditions we are not prepared to say that the jury erred in concluding that the attempt to cross appellant's track was not contributory negligence.

"Where an injury has been done to a person or property in consequence of running a train in an incorporated city, town or village at a greater rate of speed than is permitted by any ordinance of such city, town or village, under paragraph 87 of chapter 114 of the statute (Hurd's Stat. 1897), such injury must be presumed to have been inflicted by the negligence of the railroad company or the agent operating such train." Ill. Cen. R. R. Co. v. Ashline, 171 Ill. 319.

"It was proven and not denied, that defendant was violating the ordinance at the time of the accident. That fact being established, the presumption was created by virtue of section * * * that the killing of deceased was done by the negligence of defendant. * * *

"It was for defendant to rebut that presumption." A. T. & S. F. R. R. Co. v. Feehan, 47 Ill. App. 71.

In the case at bar, it is more than a mere presumption; for the engineer, seventy-five feet away, sees that the man is not likely to get off the track, and according to his own

testimony, could have stopped the train in thirty feet if it had been running ten miles an hour. Appellant also urges that standing on the highway where it was crossed by railroad tracks, was contributory negligence. The deceased was not a trespasser. He was not chargeable with notice that appellant's train would be run at an unlawful rate of speed, three times in excess of the limited rate. We are not prepared to say that, under the circumstances, standing for a few minutes on a highway so situated, is *per se* an act of contributory negligence.

Instruction numbered 40, given for plaintiff, is the usual instruction in reference to the ringing of the bell and sounding the whistle. Appellant claims that it was error to give it in this case, because the boy testifies that he saw the train approaching and notified deceased, and that there was then time to have crossed in safety. The boy testifies that when he saw the train, it was two car lengths away, about seventy-five feet, as afterward stated in cross-examination. The statute requires the bell to be rung and the whistle sounded eighty rods from a crossing. It was for the jury to say, under the testimony, if they believed they were not sounded, whether a failure to give notice eighty rods away caused death, although notice was given in another manner when seventy-five feet away. It was not error under the evidence to give the instruction.

The twelfth instruction given for defendant, in reference to the bell and whistle, stated the law definitely and positively in terms as favorable for appellant as it was entitled to ask.

Defendant's refused instructions:

Instruction numbered 25, asked and refused, is argumentative in structure, and in addition is given in substance in No. 20.

No. 28 was properly refused. It ignores the unquestioned fact that appellant's train was running at a prohibited speed. The engineer might have done all in his power to stop a train running thirty-five miles an hour, "as soon as it appeared probable to him that the deceased was paying no

attention to his warning or danger signals," but that would not of itself relieve appellant of liability, when the speed of its train was by law limited to ten miles an hour. Neither is there any evidence that the engineer ever had any experience in a similar case, that is to say, in running thirty-five miles an hour over a highway in a village, with persons delayed or delaying upon the highway and track.

The thirtieth instruction was misleading.

In referring to "a standard size of feet and boot heels worn on feet," it introduced an element not necessary to be in evidence, and ignored entirely the question as to whether if the crossing had been properly constructed in the first place, it had become unsafe by wear and use.

There is no evidence to warrant giving the thirty-first instruction. The testimony of Hubbard, appellant's civil engineer, shows that when the crossing was constructed, the space between the rail and the plank was two and one-half inches, and that by wear it had become two and seven-eighths inches. The presumption is that it was wide enough when built, as he testifies that it was properly constructed. If it was properly constructed with a width of two and one-half inches, what evidence is there to show that for the proper carrying on of appellant's business it should be two and seven-eighths inches wide?

Nineteen instructions were given for appellant, and they fairly cover every point of law applicable under the evidence.

Appellant urges that letters of administration were improperly granted to appellee, for the reason that the deceased was not a resident and had no property in this State.

Under the plea of "not guilty" this question is not before the court. Nor are any authorities cited to sustain the position. If deceased had been only injured, instead of being killed, his right to sue in this State would not be questioned. As the right of action survives, we fail to see why an administrator may not be appointed in the State where the cause of action accrued, with the right to sue in the State. Judgment affirmed.

Chicago & Alton R. R. Co. v. John Harrington.

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1. EVIDENCE—*Preponderance Not Always with the Greater Number of Witnesses.*—Mere numerical strength of evidence is not necessarily sufficient to require a verdict to be set aside when against it.

2. QUESTIONS OF FACT—*Servants in Dangerous Places.*—The questions as to whether a servant of a railroad company knowingly places himself in a dangerous position, is for the determination of the jury upon the evidence in the case.

3. ORDINARY CARE—*Switchmen Riding in Dangerous Places.*—If switchmen ordinarily and customarily ride in dangerous places when there is no necessity for doing so, the consequences are the result of their own fault. The doing of a dangerous and needless act, by any number of persons, any number of times, does not make the act right.

4. DAMAGES—*Medical Services in Personal Injury Cases.*—When expenses for medical services have been incurred by an injured party, so that he is liable therefor, he is entitled to recover for them, though they have not been paid, or have been voluntarily paid by another.

5. PRACTICE—*Calling a Witness out of the Regular Course.*—After a party has closed his case, allowing him to re-open it and call another witness, is a matter resting in the sound discretion of the court and can not be assigned for error, unless the adverse party has suffered some special injury in consequence thereof.

6. NEGLIGENCE—*Instructions Stating What is Not, is Erroneous.*—An instruction which substantially tells the jury that riding on the foot-board of a car was not negligence, takes from them a very important question which it was the province of the jury to determine, and is material error which the other instructions given in this case did not cure.

Trespass on the Case, for personal injuries. Trial in the City Court of East St. Louis; the Hon. BENJAMIN H. CANBY, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the February term, 1898. Reversed and remanded. Opinion filed August 31, 1898.

STATEMENT.

The East St. Louis freight yard of the Toledo, St. Louis & Kansas City Railroad (commonly called the Clover Leaf) is what is called a stub yard, and the only way of getting into and from the yard with cars, is from the east end of it. No passenger or freight trains run through it, but a main or lead track runs from the east end of the yard to the freight house at the west end.

From this main or lead track, a number of stub switch-tracks branch off westerly on which are received freight cars, coming from other roads, at all hours of the day and night. The switch tracks are connected with the lead track by thrown switches, which are not kept locked.

On the night of January 27, 1897, the servants of appellant transferred a number of cars of perishable freight from appellant's road to a switch track of the Clover Leaf road, and in doing so omitted to place them a sufficient distance down the switch track to allow a locomotive and cars to pass along the lead track, without coming in contact with the last car so placed on the switch track, and also omitted to close the switch, but left it open.

A short time after the switch crew and locomotive from appellant's road had left the Clover Leaf yard, a locomotive and switching crew of the Clover Leaf road came down the lead track, the locomotive pushing two freight cars (which was the usual way of switching) to be placed on a switch track. The weather was cold, the wind was blowing hard, it was snowing and dark. Two of the switching crew were on the top of the cars, one at the forward end of the front car, the other at the rear end of the rear car, while appellee, who was one of the switching crew, was on the foot-board of the locomotive.

When the cars that were being pushed reached the switch-track on which appellant's servants had left the cars they had placed on it, the cars that were being pushed ran in on the switch track and collided with the cars there, and in consequence the locomotive on which appellee was riding and the rear car next to it, came together, breaking appellee's legs, tearing off a finger, and otherwise severely injuring him. For the alleged negligence of appellant's servants in leaving the cars on the switch track as they did, and in neglecting to close the switch, appellee brought this suit, and recovered a judgment for \$11,000 damages, from which the railroad company appealed.

WISE & McNULTY, attorneys for appellant.

M. MILLARD and F. C. SMITH, attorneys for appellee. .

MR. JUSTICE BIGELOW delivered the opinion of the court.

Twenty errors are assigned, the most of which, however, need not be specifically noticed, because embraced in those to which attention has been called in appellant's brief.

The first point made is, that the weight of the evidence clearly establishes that it is not the custom of railroad employes, in switching cars in the Clover Leaf yards, to close the switches after them, but that this duty devolves upon those who follow them in the business of switching. Fourteen witnesses were sworn on behalf of the plaintiff, the majority of whom testified that the custom was for the parties last using the switch track, to close the switch before leaving it, so as to leave the lead line in safe condition for passage.

Twenty-two witnesses were sworn on behalf of the defendant, the majority of whom testified contrary to what plaintiff's witnesses had testified on that point.

The rule is too well settled to need the citation of authorities for its support, that mere numerical strength of evidence is not necessarily sufficient to require a verdict to be set aside when against it.

The second reason urged by appellant's counsel for a reversal of the judgment is stated as follows: "The plaintiff, in riding on the foot board of the engine, between the engine and a box car, when shoving in cars, placed himself in a dangerous position, and on the night he was injured, doubly so, because dark and windy, and a blinding snow blowing, so that the switchman on the head car couldn't see. Under the circumstances, plaintiff's placing himself where he was useless, where he could not see ahead, where in case of an accident he could not protect himself, and where he would inevitably be injured, was such contributory negligence on his part as prevents any recovery in this suit."

It must be admitted that plaintiff was in a dangerous position, and had he been a passenger or anything but a

switchman, the authorities cited by counsel in support of the position contended for, would have been more in point. It would have been much more satisfactory to us, if counsel had indicated where, under the circumstances, plaintiff could have placed himself so as to have been more "useful."

Already a switchman was on the top of each freight car to give warning to the engineer of danger ahead, but neither could see the obstruction made by the car on the switch track, or that the switch was open, and had plaintiff been on top of one of the freight cars, there is no reason for supposing that he could have seen what those already there could not see. In switching cars, there is no absolutely safe place where a switchman can be and properly perform his duties, and under the circumstances it may not have been unreasonable that plaintiff should have remained on the foot board ready to uncouple the locomotive from the cars, when they were placed on the switch track. Whether it was or not, was a question for the jury under proper instructions by the court.

The following question was propounded to plaintiff's witness, Neff, and the same question was, in substance, repeated to other witnesses of plaintiff: "In the operation or working of your business in your yards, where an engine was pushing a train of two cars or a small number of cars, for a short distance, say one hundred and fifty to three hundred yards, where would the switchmen ordinarily and customarily ride?"

The court, against objection of defendant, allowed the witness to answer it and defendant excepted. This was error. If switchmen ordinarily and customarily ride in a dangerous place when there is no necessity for doing so, the consequences are the result of their own fault, and the doing of a dangerous and needless act, by any number of persons, any number of times, can not make the act right. C., R. I. & P. R. R. Co. v. Clark, 108 Ill. 118; C. & A. R. R. Co. v. Bragonier, 119 Ill. 51. Opinions may be given concerning the running and management of locomotives and trains by persons skilled in the business. 7 Am. &

Eng. Ency. Law, 509; note 1. Such persons may be asked, upon an assumed state of facts, if the switchmen were in their proper places, (*C. & Z. R. R. Co. v. Smith*, 22 O. State. 227,) but this is far different from asking what switchmen ordinarily do.

Dr. McGaffigan was permitted, against the objection of appellant, to testify that the value of his services rendered plaintiff was \$200 or \$300, and it is insisted by counsel for appellant that this was error, for the reason there is no evidence that plaintiff had paid for the services. *Sutherland on Damages*, Vol. 3, page 721, says: "Where such expenses have been incurred by the injured party, so that he is liable therefor, he is entitled to recover for them, though they have not been paid, or though they have been voluntarily paid by another."

It was not error to admit the evidence. *Klein v. Thompson*, 19 O. St. 569; *Gries v. Zeck*, 24 O. St. 329.

After the defendant had introduced a portion of its testimony, and after a noon recess of the court, plaintiff was allowed against defendant's objection to call a witness, and examine him, and this is claimed to be error. The most that can be said of such a practice is, that it is irregular. Had the court refused to allow the witness to be examined it would not have been error, unless the plaintiff had given good reasons for not calling him before closing his evidence in chief. The matter of allowing the witness to testify rested in the sound discretion of the court. If this were not so, it would frequently happen that a suitor would be injured without any fault of his own, when an important witness, after having been subpoenaed and been in attendance, was suddenly taken sick after the trial had begun. It was not error to allow the witness to be called and testify, unless defendant suffered some special injury in consequence of it, and nothing of the kind is claimed.

It is also claimed that the court erred in permitting plaintiff's counsel to ask a witness for the defendant where the engineer's seat on the engine was, with reference to the top of the box car, the objection urged being, because it

was not proper cross-examination; but the abstract does not state the reason, and besides, plaintiff made the witness a witness in his own behalf, which obviated the error, if any had otherwise existed.

Plaintiff's instruction No. 2 is challenged and is as follows: "If the jury believe, from the evidence, that the injury complained of in this case was solely caused by the switch being left open, and that plaintiff was in no way connected with the act of leaving it open, or the failure to close it, and that said switch was opened and left open by the servants of the defendant, then the fact that he was riding on the foot board of the engine at the time he was injured will not alone prevent a recovery, provided plaintiff exercised ordinary care for his own safety, and the defendant was guilty of the negligence charged in the declaration."

One of the two points in the case strongly contested was, that the act of riding on the foot-board was such negligence as would disentitle plaintiff of any right to recover. Under such circumstances it was of the utmost importance that the jury should have been accurately instructed.

The instruction substantially told the jury that the act of riding on the foot-board was not negligence, and hence took from them a very important question which it was the province of the jury to determine from the evidence. The giving of the instruction was material error, which the other instructions given in the case did not cure.

What has already been stated as to plaintiff's second instruction will apply to his fourth instruction, to which exception is also taken.

Appellant's counsel having declined to furnish any reasons why the court erred in refusing to submit to the jury eight of the nine special interrogatories asked, we conclude they are satisfied the sixth interrogatory given, and which the jury answered, covered everything contained in the entire series, proper to be submitted to them, and we are of the same opinion.

The only remaining assignment of error is that the damages assessed by the jury are excessive.

Throop v. Griffin.

It must be conceded that they are much larger than are generally given by juries in this class of cases, but as the case must go to another jury it is unnecessary to pass upon the question, and therefore we express no opinion upon it.

For the errors indicated the judgment is reversed and the cause remanded.

L. D. Throop v. Joseph Griffin.

1. **SURFACE WATERS—Rights of the Dominant Owner.**—In the absence of some agreement or arrangement between the parties to the contrary, the owner of the dominant estate has the legal right, by means of drains and ditches, to collect the water on his premises that would naturally flow toward a servient estate and discharge it into a natural channel or water-course on such servient estate.

2. **SAME—Dominant Owner Can Not Change the Natural Flow.**—The owner of a dominant estate has no legal right to so collect and discharge upon a servient estate any water that would not naturally flow in the direction of such servient estate.

3. **SAME—Dominant Owner No Right to Collect Surface Waters and Discharge Them Except into a Natural Channel.**—The owner of a dominant estate has not the legal right by means of drains and ditches or otherwise, to collect even the water that would naturally flow toward the servient estate, and discharge it in a body upon the servient estate, except in a natural channel or water-course, and if there be no natural channel or water-course into which it may be discharged, then the owner of the dominant estate has no right to gather and discharge it in a body upon the servient estate.

4. **ARBITRATION—Award Fixing the Relative Rights of Adjacent Owners—Surface Waters.**—An award of arbitrators fixing the duties and rights of parties with respect to ditches and flow of surface water is conclusive, and neither party can recover damages from the other thereafter resulting from a failure to comply with the terms of the award without first showing substantial compliance on his part.

Action to Recover Damages Resulting from the Obstruction of a Water-Course.—Trial in the Circuit Court of Franklin County, on appeal from a justice of the peace; the Hon. EDMUND D. YOUNGBLOOD, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the February term, 1898. Affirmed. Opinion filed August 31, 1898.

J. A. TREEOE and C. H. LAYMAN, attorneys for appellant.

HART & SPILLER, attorneys for appellee.

MR. PRESIDING JUSTICE CREIGHTON delivered the opinion of the court.

This was a suit commenced before a justice of the peace, by appellant against appellee, to recover damages resulting from an obstruction placed by appellee in a ditch on his own land, which caused water flowing from appellant's land to back up and stand on a portion of appellant's premises.

The case was appealed to the Circuit Court, where trial was had by jury, resulting in a verdict and judgment in favor of appellee.

Appellant brings the case to this court, and urges as grounds for reversal the second, third and fourth instructions given by the court at the instance of appellee, and the admission of certain evidence relating to an arbitration had prior to that time between the parties.

Appellant and appellee owned adjoining lands. Appellant's land was higher than the land of appellee. There is a ridge in appellant's land. The land slopes both east and west from the ridge, and the natural flow of the water was from that part east of the ridge, eastward toward a creek, and from that part west of the ridge, westward toward another creek. Appellee's land is situated immediately west of appellant's. The natural flow of the water from that part of appellant's land west of the center of the ridge, is toward and over the land of appellee, but not so as to that part east of the center of the ridge.

There had been a dispute between those parties about the flow of water from these lands, and their respective ditches, and appellant had sued appellee for damages prior to the commencement of the present suit, and they had submitted the whole matter to arbitration. The arbitrators found that appellant was not entitled to the damages then claimed; that he should cut a ditch sufficient to carry all the water south from a certain line; that he should not run his ditch

Throop v. Griffin.

further east than a certain line running north and south, allowing the water to run its natural course, and that appellee should open and maintain a ditch across his land westward to a branch.

The damage sued for in this case accrued after the arbitration and award.

In the absence of some agreement or arrangement between the parties to the contrary, the law is, that the owner of the dominant estate has legal right, by means of drains and ditches, to collect the water on his premises that would naturally flow toward a servient estate, and discharge it into a natural channel or water-course on such servient estate; but the law also is, that the owner of a dominant estate has not legal right to so collect and discharge onto a servient estate, any water that would not naturally flow in the direction of such servient estate; and further, the owner of a dominant estate has not legal right, by means of drains and ditches or otherwise, to collect even the water that would naturally flow toward the servient estate, and discharge it, in a body, on the servient estate, except in a natural channel or water-course, and if there be no natural channel or water-course into which it may be discharged, then the owner of the dominant estate has no right to gather and discharge it in a body on the servient estate.

The award of the arbitrators fixed the duties and rights of these parties with respect to the ditches and flow of the water in controversy here, and neither party can recover damages from the other, thereafter resulting from a failure to comply with the terms of that award, without first showing substantial compliance on his part.

There is ample evidence tending to show that appellant was causing to flow through his ditches, and discharging in a body on appellee's premises, much water that would not naturally flow in that direction; that he was discharging such water onto appellee's premises at a point where there was no natural channel or water-course, and that he had not himself so far complied with the terms of the award as to be entitled to the use of appellee's ditch for all the water he sought to discharge into it.

The evidence concerning the award was properly admitted.

The third instruction is a statement of a mere abstract proposition, and ought not to have been given in that form, but under the facts of this case it could not have misled the jury.

The second and fourth instructions are to the effect that appellant could not recover unless he had complied on his part with the terms of the award.

Under the facts of this case we are of opinion that these instructions correctly state the law.

The judgment of the Circuit Court is affirmed.

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George Kiehna et al. v. B. H. Mansker et al., School Directors, etc.

1. **SCHOOL DIRECTORS—*Unsuitableness of a School House—Site.***—The directors may decide that a school house is inconvenient or unsuitable for a school, and they are the judges of what constitutes the inconvenience or unsuitableness of the site.

2. **SAME—*Authorized to Call Elections.***—Under paragraph 11 of section 27, chapter 122, R. S., entitled "Schools," the directors are authorized to call an election to determine where a school building shall be located.

3. **SAME—*Can Not Estop Their Successors by Selecting a School Site.***—When the location of a school site is fixed at an election called by a board of directors, the power of a new board of directors to re-submit the question of location is not thereby lost, if, in their judgment, the site selected is unsuitable or inconvenient; nor is the right of the voters of the district thereby exhausted to again determine by vote where their school house shall be located.

4. **VOTERS—*Refraining from Voting.***—At a school election for selection of a school site, if voters opposed to the proposed location refrain from voting, it is their privilege; and having done so, they can not complain of the result.

Bill for an Injunction.—Appeal from an order dissolving an injunction. Entered in the Circuit Court of Perry County; the Hon. WILLIAM HARTZELL, Judge, presiding. Heard in this court at the February term, 1898. Affirmed. Opinion filed August 31, 1898.

Kiehna v. Mansker.

STATEMENT.

This is an appeal from an order dissolving an injunction, issued upon the prayer of appellants as residents and taxpayers of school district No. 4, town 6 south, range 3 west, in the county of Perry, State of Illinois.

Complainants as tax payers and residents of said school district No. 4, alleged in their original bill of complaint in substance, that the directors of said district ordered an election to be held on February 6, 1897, to vote on building a new school house, and locating it at center of district at Darrington Well, and on issuing bonds to the amount of \$650. That proper notices were posted and the election held, resulting in twenty-one votes for building at center of district, and nineteen against; and twenty-one in favor of issuing \$650 in bonds, and nineteen against; and that a proper record was made of such proceedings. That prior to the election a deed for one acre of ground at said center of district had been made to the school trustees of said township for school purposes. That a contract to build the school house was awarded to William Russel.

That at an adjourned meeting of the board of school directors, held April 16, 1897, the contract with Russel was canceled and a contract to build entered into with S. H. Carson.

That an issue of bonds to the amount of \$600 was ordered.

That suit was brought against said district to declare said election void, and to enjoin building school house at center of district, which suit was continued at the April term, 1897, of the Circuit Court by agreement of parties.

That at the April election of school directors, 1897, the complexion of said board of school directors was changed from a majority in favor of building at the center of the district, to a majority opposed to building there.

That subsequent to the election of said board of directors, in April, 1897, said board determined to ignore said election to build, and determined to call another election, and alleges notice for said election to be held July 24, 1897, for or against building school house on old site, and for or

against issuing bonds to the amount of \$600. That no title to the old site had ever been made for the use of the district.

That the larger number of those opposed to said proposed election determined to refrain from voting thereat.

That in case of success at said election, said board designed to award contract and issue and sell bonds, which would result injuriously to complainants and the tax payers of said district. That the old site was a half mile distant from the center of the district.

Prayer for temporary injunction restraining said directors from holding said election, and from issuing bonds, and letting contract. On the 23d of July, 1897, a temporary injunction as prayed for was issued by the master in chancery.

On the 11th of September, 1897, upon motion of defendants in vacation, the temporary injunction was dissolved, and an appeal prayed from such order of dissolution by complainants, which was allowed upon filing bond in sum of \$100 in forty days. The bond was filed but the appeal was not taken.

On the 4th of October, 1897, the board of directors again ordered an election to be held on the two propositions of building at the old site, and of issuing bonds to the amount of \$600, which election was held October 16, 1897, resulting in twenty-six votes in favor of building on the old site and none against it.

On October 30th a supplemental bill was filed, alleging the dissolution of the temporary injunction on September 11th, and the prayer for appeal, filing of bond, and allowance of appeal.

It also alleges the meeting of the board of directors October 4th, the posting of notices October 5th, and the holding of the election October 16th, resulting in twenty-six votes for building on the old site and for issuing bonds, and none against. It also alleges that the board of directors intend to carry out the purpose of said election. Upon this bill as supplemented, a temporary injunction was issued November 5th.

Kiehna v. Mansker.

On November 8th defendants filed their answer, and on November 26th the cause was heard in open court, and the temporary injunction dissolved. It is from this order that this appeal was taken.

JOHN BOYD and C. R. HAWKINS, attorneys for appellants.

W. T. VAUGHN, CHAS. D. KANE and B. W. POPE, attorneys for appellees.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

Counsel for appellant in their brief and argument, say :

"The question at issue seems to be narrowed down simply as to the right of the school board to change, or order an election for a change of site, as located by election on the 6th of February, 1897, unless some good reason be shown for such action, such as the site having been located in a sickly or dangerous locality; or, conceding such right, has it in this instance been legally and rightfully exercised?"

This is the only question involved.

It is provided in paragraph 11 of Sec. 27, Chap. 122, of the School Law, page 1449, Hurd's Statutes, 1897, that "They (the directors) shall have power to decide when the school site, or the school buildings, have become unnecessary, or unsuitable, or inconvenient for a school."

It is provided in Sec. 31, p. 1450, of the same chapter, "It shall not be lawful for a board of school directors to purchase or locate a school house site, or to purchase, build or move a school house, * * * without a vote of the people at an election called and conducted as required by Sec. 4 of Art. 9, of this act."

Under the paragraph first cited, the directors may decide that a school house is "inconvenient or unsuitable for a school." They are the judges of what constitutes the inconvenience or unsuitableness of the site. In this case it appears from the evidence that the site selected at the election on February 6, 1897, was deemed by the board of

directors elected in April, 1897, "inconvenient and unsuitable," because it was inaccessible by any public highway, and could only be reached by crossing private grounds a distance of a quarter of a mile, for which no permit had been obtained, and which the owner of the grounds testified he would claim damages for if a road was not put through. In the exercise of their discretion, in view of this condition, we think it clear that under the power conferred upon the board by paragraph 11, *supra*, the directors were authorized to call an election to determine where the building should be located. Admitting that by the election of February 6, 1897, the location was changed from the old site to the center of the township, the power of a new board of directors to re-submit the question of location was not thereby lost, if in their judgment the site selected was unsuitable or inconvenient; nor was the right of the voters of the district thereby exhausted to again determine by vote where their school house should be located. It is not claimed that due notice was not given, nor that the majority did not select the old site. If those opposed to that location refrained from voting, as it is alleged in complainant's bill they had determined to do, that was their privilege; but having done so, they can not complain of the result.

It is urged that the order October 4th for the election of October 16, 1897, ignores the right of the voters to select a site, because it limits the question submitted, to building "a new school house on the old site."

We think there is nothing in this objection. Its effect was to put the old site in competition with any and all other sites. It is apparent, however, from the evidence, that the contest was between the old site and the site selected February 6th at the center of the district. The result was to change the location from the site selected February 6, 1897, to the old site, selected October 16, 1897.

Seeing no error in the record, the judgment of the court is affirmed.

Village of Crossville v. James E. Stuart.

1. **VERDICTS—Where There is Evidence to Sustain.**—Where there is evidence from which the jury could properly find their verdict, it will not be disturbed, although the evidence might, in the opinion of the Appellate Court, justify a different result.

2. **SURFACE WATER—Drains for Agricultural Purposes.**—The owner of the upper field can not construct drains or ditches so as to create new channels for water in the lower fields, but he may make such drains for agricultural purposes, on his own land, as may be required by good husbandry, although, by so doing, the flow of water may be increased in a regular well-defined channel, which carries the water from the upper to the lower field.

3. **SAME—When the Flow of it May be Increased.**—While the flow of surface water from the dominant estate upon the servient estate may, in the interests of good husbandry, be increased by ditches and drains, its natural flow from the surface in one channel can not be diverted into another and different channel so as to increase the flow upon the servient estate.

4. **SAME—Servient Estate Must Bear the Burden.**—The servient estate is required to bear the burden of having cast upon its surface, to flow through natural channels across it, the water which in a state of nature would flow over or upon it through such channels only.

Trespass on the Case, for changing the natural flow of surface water. Trial in the Circuit Court of White County; the Hon. PRINCE A. PEARCE, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the February term, 1898. Affirmed. Opinion filed August 31, 1898.

PARISH & PARISH and C. S. CONGER, attorneys for appellant.

N. HOLDERBY, attorney for appellee.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

Action against appellant for flowing appellee's lot, by cutting ditches and changing the natural flow of surface water.

Plea of not guilty.

Verdict and judgment for \$50.

The questions at issue are questions of fact, involving the lay of the ground in and adjacent to the village, as bearing upon the natural flow of surface water, and the action of appellant in constructing ditches. The evidence is sharply conflicting. There were eleven witnesses for the plaintiff and fifteen for the defendant. They testified referring to maps produced at the trial by each side. The court and jury seeing and hearing the witnesses and seeing the localities pointed out by them on the maps, were better able to pass upon questions of fact than we are. There is ample evidence to sustain the verdict if uncontradicted. When this is the case, an Appellate Court will not set aside a verdict on the evidence alone. "It is only where there is no evidence in the case upon which the finding of the jury can rest, or when the finding is against the clear weight of the evidence, that we are justified in setting their verdict aside." *T., St. L. & K. C. R. R. Co. v. Cline*, 31 Ill. App. 568.

"The rule is that where there is evidence from which the jury could properly find their verdict, it will not be disturbed, although the evidence might, in the opinion of the Appellate Court, justify a different result." *T. W. & W. R. Co. v. Moore*, 77 Ill. 219.

It is urged by appellant that the latter part of the third instruction given for appellee is erroneous.

The instruction is as follows:

"You are instructed that the rules of law which should govern you in the present case are as follows: That the lower tract of land must be subject to all the natural flow of water from the upper land, and that the defendants in this case would have no right to divert more water than would naturally flow onto the plaintiff's land, nor has the defendant a right to make new excavations or drains by which the flow of water is diverted from its natural channel, nor can defendant collect into one channel water naturally flowing into another channel upon the surface as surface water, and thus increase the water upon the premises of the plaintiff." (Given.)

Village of Crossville v. Stuart.

It is said in *Peck v. Herrington*, 109 Ill. 619, cited by appellant, "It may be regarded as a well settled rule that the owner of the upper field can not construct drains or ditches so as to create new channels for water in the lower fields, but he may make such drains for agricultural purposes, on his own land, as may be required by good husbandry, although by so doing the flow of water may be increased in a regular, well-defined channel, which carries the water from the upper to the lower field."

In this case the court say: "The natural flow of this water was not changed by the drainage."

The clause of the instruction complained of is: "Nor can defendant collect into one channel water naturally flowing in another channel upon the surface as surface water, and thus increase the water upon the premises of the plaintiff."

To speak of water flowing in a channel as "surface water," "upon the surface," is confusing and contradictory in terms. Water flowing in a channel is not flowing on the surface, as that phrase is understood. It may have been surface water, and surface water may be gathered into a natural channel, although thereby increasing the flow by that channel upon the servient estate, and no liability be thereby incurred. But when gathered into a natural channel, that leads from the dominant to the servient estate, it can not then be diverted into another natural channel so as to increase the flow by that channel upon the servient estate. The instruction is therefore ambiguous and faulty.

We do not think, however, that when considered with the rest of the instruction, the clause amounts to reversible error, especially in view of the clear and pointed language used in appellant's third instruction, which is as follows: "The charge in the declaration is that the defendant unlawfully cut ditches that carried water onto the land of Stewart that would not naturally flow upon it. If the defendant has not done this, the jury should find for the defendant."

The law is that while the flow of surface water from the dominant estate upon the servient estate may, in the inter-

ests of good husbandry, be increased by ditches and drains, its natural flow from the surface in one channel can not be diverted into another and different channel so as to increase the flow upon the servient estate.

In *Union Drainage Dist. v. O'Reilly*, 132 Ill. 634, it is said: "As the servient estate, the land of appellees was required to bear the servitude of having cast upon its surface to flow through the natural channels across it, the water that in a state of nature would flow over or upon it through such channels only."

To the same effect are: *Peck v. Harrington*, *supra*; *Dayton v. Drain. Com'rs*, 128 Ill. 276; *C. & A. R. Co. v. Glenney*, 28 Ill. App. 369; *Graham v. Keene*, 34 Ill. App. 89.

Considering all the instructions together, the jury was not misinformed as to the law, and their conclusion as to the facts should not be disturbed. Judgment affirmed.

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Nelson Morris, Edward Morris, Hubert Morris and Frank E. Vogel, Partners, Doing Business as Nelson Morris & Co., v. Peter J. Pfeffer.

1. *PRACTICE—Refusal of Special Findings—Exceptions.*—Where a party asked for special findings, which the court refused, and such refusal was not presented to the trial court as a reason for a new trial, and not assigned as error, it will not be considered by the Appellate Court.

2. *MASTER AND SERVANT—When the Master is Liable.*—The master is liable to a servant when he orders him to perform a dangerous work, unless the danger is so imminent that no man of ordinary prudence would expose himself to it.

3. *SAME—Where the Servant has Knowledge.*—Even if the servant has some knowledge of the attendant danger, his right of recovery will not be defeated, if in obeying the order he acts with that degree of prudence with which an ordinarily prudent man would act under the circumstances.

4. *SAME—What the Servant May Assume.*—When the master orders his servant to perform his work, the latter has the right to assume that the former, with his superior knowledge of the facts, would not expose him to unnecessary perils; the servant has the right to rest upon the assurance that there is no danger which is implied by such an order.

Morris v. Pfeffer.

5. *SAME—Duty of the Servant.*—The master and servant are not altogether upon a footing of equality. The primary duty of the latter is obedience, and he can not be charged with negligence in obeying an order of the master, unless he acts recklessly. Whether he acted so in obeying such orders, or whether he acted as a reasonably prudent person should act, are questions of fact, to be determined by the jury.

6. *SAME—Who is Boss or Vice Principal—Contributory Negligence.*—Who is a vice principal, and was the servant guilty of contributory negligence in using appliances he knew to be unsafe and dangerous, are questions to be decided by the jury.

7. *VERDICTS—Not to be Set Aside When Apparently Against the Weight of the Evidence.*—A verdict will not be set aside when there is a contrariety of evidence, and the facts and circumstances by a fair and a reasonable intendment, authorize it, notwithstanding it may appear to be against the strength and weight of testimony.

Trespass on the Case, for personal injuries. Trial in the City Court of East St. Louis; the Hon. BENJAMIN H. CANBY, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the February term, 1898. Affirmed. Opinion filed March 1, 1898.

HAMILL & BORDERS, attorneys for appellants.

JESSE M. FREELS and BENNETT & HUNT, attorneys for appellee.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

On the 17th day of October, 1895, appellants were conducting a slaughter and packing establishment near East St. Louis, employing several hundred men. Parts of the animals slaughtered were boiled inside the building, and the grease, together with hot water, was conveyed to a catch basin outside the building and adjacent thereto.

This basin was divided into sections communicating at the bottom. The grease being the lighter floated on the top, while the water passing through the opening at the bottom, flowed from section to section. The grease was skimmed from the top by an employe called a "skimmer." Patrick Morrison was in October, 1895, and had been for a long time previous, the "skimmer." Another employe,

called the "carrier," took the grease when skimmed and emptied it into barrels. It was also his duty to scrape the sides of the sections so as to save what grease adhered to them. At the time of the accident, appellee, who was the "carrier," had scraped all the other sections, and was working at the one next to the building into which the hot fluid flowed. This section was five feet three inches long, three feet six inches wide, inside measurements, and four feet deep. It was three feet six inches from the bottom to the high-water mark, and six inches from this mark to the top. There was a railing or narrow two-inch plank six inches wide on the top rim of the section. In order to scrape the sides of the section, a plank was placed across the top on which the scraper stood. Appellee, having finished the last section, was in the act of rising up to turn around, and step off the plank on which he had been standing, when one end slipped from the railing of the basin, and precipitated him into the hot grease and water. He brought suit for personal injuries and recovered judgment for \$1,000.

The declaration avers that plaintiff was employed as a laborer in and about the building of the defendant; that the plaintiff was directed by one of the foremen or agents of defendants, who had authority to order him to get upon the plank placed over one of the catch basins, to scrape the grease from the sides of the catch basin into which the hot grease and water flowed, and while in performance of the work, as ordered, and while exercising all due care and caution, that said plank across the catch basin was so insufficient or defective in construction as to width, length, and not having proper cleats to hold it in its place upon the top of such catch basin, as to cause it to slip from under his feet, and throw him into the scalding water and grease up to his waist, thereby scalding him, etc., so that he is permanently injured in the loss and use of his limbs and general health, and has suffered great pain, and has lost his earnings, and will lose them in the future, and has been put to expense for medicine, medical services, etc., to wit, to the amount of \$200, to his damage of \$10,000.

Morris v. Pfeffer.

Defendant pleaded the general issue. Judgment was rendered for \$1,000.

Appellant asked for two special findings, which the court refused to direct. As this refusal was not presented to the court as a reason for a new trial, and is not assigned as error, it will not be considered.

It is urged that the court erred in refusing to give appellant's instruction numbered "22."

Eighteen instructions were given for appellant, full, comprehensive, and covering every phase of the case. In the twenty-first instruction the court told the jury that "as a matter of law, an employe can not recover for an injury sustained in the course of business about which he is employed on account of defective appliances used therein, if he had knowledge of these defects causing his injury, and continued his work."

This is a broad statement, and covers the case as conditioned in the refused instruction.

We think, also, that the latter part of the twenty-second instruction was too broad. After stating that, if the plaintiff knew that the plank was unsafe or dangerous by reason of being too short or not having cleats, it says, "then, the plaintiff assumed all the risk on account of said defect, and can not recover for said injuries, and under such circumstances it is wholly immaterial and is no excuse or justification that plaintiff would be discharged if he did not use said plank, and it would be wholly immaterial whether Morrison was a boss or not."

Appellee testifies: "On the 17th of October, 1895, I was working with my buckets carrying grease, when the under boss, Morrison, stopped me and directed me to go and clean the catch basin. He said: 'You take that board—here is a good, handy board—and you go ahead and clean that catch basin, and hurry up if you know what is good for you, and you want to keep your job.' I said, 'I think the board looks small.' I meant it was not long enough by the looks of it. * * * I trusted in him and took the board and went to work." And again: "When

Morrison gave me the board he said, 'Where in the hell was you all morning? Stein wants that catch basin cleaned in a hurry. It ought to have been done long ago. Now, hurry up and get a move on you, if you know what is good for you. Here is a good, handy board.' * * * Stein was the boss. He hired me. The boss I had to listen to was Morrison. Stein would give the orders to Morrison and he would give them to me, and if I would not do it he would report it and I would be discharged." And again, in cross-examination: "I used this plank in the other three sections or partitions. * * * I knew the length of the board when I got on it, but thought I could clean the basin on the board by being careful. * * * I told Morrison it looked short, and he said, 'It is long enough and strong enough to hold you up.' I believed in him, and tried it, and thought I could make it by being careful."

In *Ill. Steel Co. v. Schymanowsky*, 162 Ill. 459, the court say: "The master is liable to a servant when he orders the latter to perform a dangerous work, unless the danger is so imminent that no man of ordinary prudence would incur. Even if the servant has some knowledge of attendant danger, his right of recovery will not be defeated if, in obeying the order, he acts with the degree of prudence which an ordinarily prudent man would exercise under the circumstances. When the master orders his servant to perform his work, the latter has the right to assume that the former, with his superior knowledge of the facts, would not expose him to unnecessary perils; the servant has the right to rest upon the assurance that there is no danger, which is implied by such an order. The master and servant are not altogether upon a footing of equality. The primary duty of the latter is obedience, and he can not be charged with negligence in obeying an order of the master, unless he acts recklessly in so obeying. Whether he acted thus recklessly in obeying his master's orders, or whether he acted as a reasonably prudent person should act, are questions of fact to be determined by the jury."

Morris v. Pfeffer.

An employe might fear that an appliance was dangerous, and yet believe that by its careful use he would receive no injury. The assurance of the master or his representatives that it was safe, coupled with an order to use it at once, under threat of discharge, are circumstances proper to be considered by the jury, and should not be excluded by instruction. The latter part of the refused instruction in effect tells the jury that all these circumstances are "wholly immaterial." We think, for this reason, that there was no error in refusing the instruction.

The testimony of the witnesses Irwin Fricke and Charles Fricke, as to the authority of Morrison from June to August and from April to May, 1895, is objected to as not being pertinent. An order of business proved to exist is presumed to continue when conditions are the same. In addition to this appellee testifies: "I worked for defendant at the time Mr. Fricke testified that he was working there, and Mr. Morrison continued to exercise the same authority up to the time of the accident that he did at the time Mr. Fricke was working there." The testimony of appellee to the effect that Morrison's authority was the same at the time of the accident as when the Frickes worked there, makes their testimony pertinent, even if not pertinent before.

The real contest in the case turns upon two points, viz.: Was Morrison a boss, a vice-principal, and appellee working under his orders, and was appellee guilty of contributory negligence in using an appliance that he knew was unsafe and dangerous.

These were questions to be decided by the jury. The instructions bearing upon these were clear, and the finding was for appellee. It would serve no useful purpose to lengthen an opinion by an extended analysis of testimony.

"If any rule of this court can be so well established as to be neither questioned nor to require the citations of authorities to support it, it is that a verdict will not be set aside whenever there is a contrariety of evidence, and the facts and circumstances by a fair and reasonable intendment, will

authorize the verdict, notwithstanding it may appear to be against the strength and weight of testimony." Ill. Central R. R. Co. v. Gillis, 68 Ill. 317.

This rule applies to the present case. There is a "contrariety" of evidence. The jury was fully instructed as to what were material allegations in the declaration, and that they must be proved by a preponderance of the evidence. They listened to the contradictory testimony, and found that the material allegations were proved. Their functions as triers of fact should be recognized unless it has been clearly abused or misused. Judgment affirmed.

A. B. Ward, Guardian of Burton L. Ward, v. The People of the State of Illinois.

1. **SET-OFF—Construction of the Statute.**—The statute requiring parties before a justice of the peace to consolidate all their respective demands has no application to suits commenced in courts of record.

2. **SAME—Administrator to Set Off a Debt Against a Suing Creditor.**—An administrator of an estate is not bound to set off any debt or demand such estate may have against a suing creditor, and his failure to do so will not bar such debt or demand.

Contempt Proceedings.—Appeal from the Circuit Court of Jasper County; the Hon. WILLIAM M. FARMER, Judge, presiding. Heard in this court at the February term, 1898. Affirmed. Opinion filed August 31, 1898.

E. W. HERSH and GIBSON & JOHNSON, attorneys for appellant.

FITHIAN, DAVIDSON & KASSEMAN, attorneys for appellee.

MR. PRESIDING JUSTICE CREIGHTON delivered the opinion of the court.

This was a citation directed by the County Court of Jasper County against appellant. Appellant was guardian of Burton L. Ward, who, pending such guardianship, died,

Ward v. The People.

and one William Shup was appointed administrator of his estate. Appellant had made a report which the County Court would not approve, and in 1895 ordered him to restate his account, from which order he appealed to the Circuit Court, and pending that appeal he commenced an original suit in assumpsit in the Circuit Court against the administrator of his deceased ward. In that suit he sought to recover for the items of credit which he had claimed in his report and which the County Court had refused to allow. To his declaration the administrator pleaded non-assumpsit and the statute of limitations. The trial resulted in a judgment in favor of appellant for \$240, after which he dismissed his appeal from the order of the County Court requiring him to restate his account. After dismissing his appeal he failed and refused to restate his account, and on the 25th day of February, 1897, was cited by the County Court to show cause why he should not be attached for contempt.

To this citation he answered as follows :

“ STATE OF ILLINOIS, }	ss.	In the County Court,
Jasper County. }		To April Term, 1897.

TO THE HONORABLE H. M. KASSERMAN, JUDGE OF SAID COURT :

This respondent, A. B. Ward, against whom a citation has been issued out of said court commanding him to show cause why he does not make a report as guardian of one Burton L. Ward, deceased, and charge himself with various items as set out in the petition for said citation, and also restate a former report made by him in said guardianship, for answer thereto says : That since the making and filing of his former report in said guardianship, to-wit, at the May term, 1896, of the Circuit Court of said Jasper county, he brought a suit against William Shup, administrator of said Burton L. Ward, at whose petition said citation was issued, and that upon a hearing of said cause in said court at the December term, 1896, of said court, he recovered a judgment against said William Shup as such administrator, for the sum of \$240 as will more fully appear by a copy of the summons, declaration, pleas and replications in said

cause, and a copy of the judgment of said court in said cause hereto attached and made a part of this answer. And he further shows that he is advised by counsel that by said proceedings so had in said Circuit Court, all matters between him and said William Shup, as administrator of said Burton L. Ward, became *res judicata* as to all matters between said parties growing out of or connected with the estate of said Burton L. Ward and that by said judgment the said William Shup as such administrator is indebted to this respondent in the sum of \$240 as aforesaid, and that this respondent is not liable to said William Shup as administrator for any sum of money on account of anything respondent may have had in his hands as the guardian of said Burton L. Ward at the time of the commencement of said suit against said William Shup as such administrator.

Respondent further shows that he has not received any money or property of any kind or character since the commencement of said suit at law, and he respectfully denies the right of said William Shup as such administrator to have him cited and denies the right of this honorable court to require him to restate his account as such guardian as indicated in said petition for a citation, and says that the only report he should be required to make in said cause is to show that he has paid the costs of said guardianship, whereupon he should be discharged from any further duty or liability therein."

To the foregoing answer appellee excepted, and upon a hearing the County Court sustained the exceptions, and ordered appellant to comply with the former order of the court and restate his account at once, and upon failure to do so, that he be considered in contempt of court. From this order appellant appealed to the Circuit Court, where appellee renewed its exceptions, and upon a hearing the Circuit Court sustained the exceptions, dismissed the appeal and remanded the cause to the County Court. Appellant now brings the case to this court, and urges as grounds for reversal that the Circuit Court erred in sustaining the exceptions to his answer, and in not trying the case *de novo*.

Appellant's principal reliance is upon his position that

after the recovery of his judgment against the administrator of his deceased ward, the whole subject-matter of this citation was *res judicata*; that after the judgment was rendered he could not be compelled to account to his ward's estate for anything. That position is not well taken. Under the issues as made up in that case, the debt he owed his ward's estate was not involved. At common law a defendant could not set off his demand against a plaintiff's demand. Our statute concerning set-off in courts of record is merely permissive and not imperative. The statute requiring parties in suits before a justice of the peace to consolidate all their respective demands, has no application to suits commenced in courts of record. In *Morton v. Bailey et al.*, 1 Scam. 213, it is said in substance, an administrator of an estate is not bound to set off any debt or demand such estate may have against a suing creditor, and his failure to do so will not bar such debt or demand. It is suggested that the judgment for \$240 against the administrator was recovered after the order to restate the account was entered, and that the judgment upon the citation proceedings requires appellant to restate it as originally ordered.

The citation commanded him to show cause. He might have responded by exhibiting his judgment and moving the court to modify the original order, so as to allow him in his restatement to take credit for the \$240; or he might have complied by restating his account according to the original order, and have collected his judgment from the estate of his ward in due course of administration, but he did neither. He pleaded his little judgment in bar of all liability and all further duty as guardian.

Upon the dismissal of his appeal from the original order, that order remained in full force and effect in the County Court, and his answer to the citation discloses no just cause why he should not obey it. It is contended that appellant ought to have had a trial *de novo* in the Circuit Court. The only question embraced in his appeal was whether he had just cause for refusing to restate his account. All he offered in the Circuit Court was the answer he had made in the County Court. When that was held insufficient, he neither

Schmisser v. Penn, 47 Ill. App. 279. After a full review of the facts and authorities, the court say: "The easement was an incumbrance, and her right of way appurtenant is not included in the term highway as used in Sec. 10 of the conveyance act, and that incumbrance existing at the time of the delivery of the deed to the defendant by the complainant, the implied covenant existing in that deed by reason of the statute was broken on the delivery of the deed. See *Wadham v. Swan*, 109 Ill. 46; *Christy v. Ogle's Executors*, 33 Ill. 295. And that defense may be set up in answer to a bill to foreclose a mortgage given to secure the purchase price. See *Patterson v. Sweet*, Adm'r, 3 Ill. App. 550; *Coffman v. Scoville*, 86 Ill. 300; *Tenney v. Hemenway*, 53 Ill. 97. The evidence showing that the defendant was damaged by reason of the existence of the right of way, the extent of the damage should have been set off against the amount of the notes, and that not being done the decree must be reversed and the cause remanded."

Under this decision the case being remanded, there was nothing for the court below to do but to ascertain the amount of damages, and set it off against the amount due on the notes. All other issues were decided. This being so, the introduction of the decree to prove the easement and breach of the covenant of warranty amounted to nothing. Such proof in the retrial of the case was immaterial. The case was not remanded to try this issue. It follows from this, that there was no error of substance in admitting the decree declaring the easement, although plaintiff in error was not a party to the case in which it was declared.

Questions once passed upon will not be considered in a second appeal of the same case. *W., St. L. & P. v. Peterson*, 115 Ill. 597; *Smyth v. Neff*, 123 Ill. 310; *Flower v. Brumbach*, 30 Ill. App. 294; *Ogle v. Turpin*, 8 Ill. App. 453; *Cent. Warehouse Co. v. Sargeant*, 40 Ill. App. 438.

"Where some specific fact or question has been adjudicated and determined in a former suit, and the same fact or question is again put in issue in a subsequent suit between the same parties, its determination in the former suit, if

properly presented and relied on, will be held conclusive upon the parties in the latter suit, without regard to whether the cause of action is the same in both suits or not. Reynolds v. Mandel, 73 Ill. App. 381.

"The only errors that can be assigned are those that may have arisen since the former adjudication of the case." Mfg. Co. v. Wire F. Co., 119 Ill. 31.

As there is no exception taken to the amount of damage, and as all other issues were settled by this court at the former hearing of this case as reported in Schmisser v. Penn, *supra*, there is nothing now before this court for review. Decree and judgment affirmed.

**East St. Louis Electric St. Ry. Co. v. John Burns,
Adm'r.**

1. **ESTOPPEL—Confessing a Motion for a New Trial.**—A plaintiff who confesses a defendant's motion for a new trial, does not confess that he has no cause of action by doing so. He simply consents to the defendant's request and the order granting the motion is not a judicial determination of anything.

2. **INFANCY—Age of Competency.**—The question as to whether a boy between eight and nine years of age is competent to determine for himself what, if any, acts or omissions on his part are negligence, is one which the court can not determine; it is the province of the jury to determine it, from all the evidence before them, taking into consideration their own experience as to what can reasonably be expected from a boy of that age.

3. **RES GESTÆ—As to Accidents.**—Whatever took place at the car when the accident occurred is a part of the *res gestæ* and proper to be admitted in evidence.

4. **ATTORNEYS—Conduct in Court.**—Counsel should at all times be respectful to the court and jury, for upon the good conduct of counsel depends, in a large degree, a proper administration of justice.

Trespass on the Case, for personal injuries. Trial in the City Court of East St. Louis; the Hon. BENJAMIN H. CANBY, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this

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court at the February term, 1898. Reversed and remanded. Opinion filed August 31, 1898.

STATEMENT.

Appellant operates an electric street railroad along Converse avenue in East St. Louis. The street runs nearly east and west and is crossed at right angles by Fourth, Fifth and Sixth streets. At the corner of the avenue and Fourth street is a school house, in the rear of which is a yard, used by the scholars attending school as a playground, and beyond the gate is an alley running from Fourth to Fifth street.

Deceased, a boy between eight and nine years of age, attended the school, and at recess in the afternoon of a day in September, 1896, he and a number of other boys began the play of "catch," or "tag," and deceased, being ahead, ran, with the other boys after him, out of the yard and up the alley to Fifth street, and from Fifth street turned into Converse avenue, and immediately on turning into the avenue he was struck by a motor car coming toward him and killed.

The motorman testified he saw the boy when he was thirty-five or forty feet distant from the car running toward the car, which was running between three and four miles an hour.

Deceased left a father, mother, two brothers and a sister surviving him, and this action is brought to recover damages to their means of support.

The case has been tried twice. The verdict on the first trial was for \$487.50. On the return of the first verdict, the defendant filed a motion for a new trial, for reasons stated as follows: First, the damages awarded by the jury are excessive. Second, the court refused to instruct the jury at the close of plaintiff's testimony to find defendant not guilty. Third, the court refused to instruct the jury, at the close of all the testimony, to find defendant not guilty."

This motion the plaintiff confessed. Before the second

trial, defendant entered a motion for judgment for defendant, on the ground that plaintiff, by confessing the motion for a new trial, had confessed he had no cause of action, but the court denied the motion. The verdict at the last trial was for \$2,783.33, but the court required the plaintiff to remit \$783.33, and entered judgment for \$2,000.

CHARLES W. THOMAS, attorney for appellant.

M. MILLARD and F. C. SMITH, attorneys for appellee.

MR. JUSTICE BIGELOW delivered the opinion of the court.

Appellant has assigned a number of errors, but all of them except the second are really embraced in the first, which questions the ruling of the court in not entering judgment for defendant, by virtue of plaintiff's confession of defendant's motion for a new trial.

The contention of appellant's counsel seems to be that since the causes of appellant's motion for a new trial were specially stated, and the motion was confessed, and the whole proceeding made a part of the record by a bill of exceptions, an estoppel of law was thus created against appellee.

The point is a novel one, and the only authority to which we are referred in support of it is *Metropolitan West Side Elevated Railroad Co. v. Minnie White et al.*, 166 Ill. 375. We are unable to see wherein that case supports the contention insisted upon. By confessing defendant's motion, plaintiff simply consented to defendant's request for a new trial, and the order granting the motion was really not a judicial determination of anything.

The second error assigned questions the ruling of the court in denying defendant's motion for a new trial. One of the points made in the motion was the refusal of the court to instruct the jury to find for the defendant.

This instruction was based upon the assumption that the boy was guilty of such contributory negligence as precluded a right to recover. The question whether the boy

was competent to determine for himself what, if any, acts or omissions on his part were negligence, was one which the court could not determine; but it was the especial province of the jury to determine it, from all the evidence before them, taking into consideration their own experience as to what could reasonably be expected from a boy of his age.

The court did not err in refusing the instruction.

Plaintiff was allowed to prove by one or more witnesses that no bell was rung on the car, but afterward other witnesses of plaintiff were not allowed to testify, because of defendant's objection. We do not regard the question as to whether a bell was rung of any particular importance. Plaintiff claimed nothing, either in his declaration or instructions, because of it. Whatever took place at the car when the accident occurred, was a part of the *res gestæ* and proper to be admitted in evidence.

The court properly refused defendant's instructions telling the jury that there is no law in this State in regard to the speed electric cars may be run, or that requires a bell or gong to be sounded at street crossings. Had the instructions been confined to statutes or ordinances, they might have been proper; but as offered, they were misleading: since the jury might have inferred that the law permitted such cars to be run at any speed in a populous city and without any notice of their approach to street crossings.

It is urged by appellant that appellee's counsel, in arguing the case to the jury, called certain of the jurors by name and personally addressed his remarks to them, and that such act was error. Who or how many of the jurors were so addressed, or what counsel said to them, does not appear, and we have no means of telling whether the remarks were proper and such as should have been allowed during the trial or otherwise, but the presumption is they were.

Counsel should at all times be respectful to court and jury, for upon the good conduct of counsel depends in a large degree a proper administration of justice.

Anderson v. Anderson.

It is finally insisted that the damages are excessive. It must be conceded that they are larger than the usual verdicts in this class of cases, and it does not seem to us that the jury could have fully considered and been guided by the law, as given to them by the court, and which it was their duty to follow.

Here are two verdicts of two juries, on substantially the same state of facts. The first is for \$487.50, and the last is for \$2,783.33. We are at a loss to account for the difference, unless it can be attributed to passion. Nothing can be recovered for pain and suffering by deceased or for loss of affection and society by surviving relatives.

The evidence as to amount of damages is so meager and the difference in the amounts as found by the respective juries is so great as to evidence want of proper consideration of that question; under the evidence contained in the record, we are not satisfied with the amount of damages as finally fixed by the judgment of the court, and we are of the opinion that the case ought to be submitted to another jury, and that the court erred in overruling defendant's motion for a new trial; for this error the judgment is reversed and the cause remanded.

John P. Anderson v. Alexis D. Anderson.

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1. **JUDGMENTS—Impeachable for Fraud.**—A judgment of the County Court, on a settlement between guardian and ward, or executor, trustee and *cestui que trust*, is impeachable for fraud in a court of equity, and a judgment by consent or agreement of a party or his counsel is as impeachable in a court of equity as if rendered upon trial of issues.

Bill to Set Aside a Settlement of Executor's Accounts.—Tried in the Circuit Court of Madison County; the Hon. MARTIN W. SCHAEFFER, Judge, presiding. Hearing and decree for complainant. Appeal by defendant. Heard in this court at the February term, 1898. Affirmed. Opinion filed August 31, 1898.

HADLEY & BURTON, attorneys for appellant.

A valid judgment sweeps away every defense that could have been raised against the action, and this, too, for the purpose of every subsequent suit, whether founded on the same or different causes; nor will equity relieve the defendant from a judgment on any ground of which he should have availed himself in an action at law. *Kelly et al. v. Donlin et al.*, 70 Ill. 385; *Rogers v. Higgins et al.*, 57 Ill. 247.

A party can not ask for relief in equity on the ground that he has failed or omitted to make a defense at law, even when the judgment is manifestly wrong in law and in fact, or when by allowing it to stand will compel the payment of a debt the defendant does not owe, unless it appears that it was obtained by fraud, or was the result of an accident or mistake. *Holmes v. Satelar*, 57 Ill. 212.

While a court of chancery has the power to afford relief in a proper case against a judgment at law, it must appear that the party complaining has been guilty of no negligence or *laches*, and that he has been prevented from interposing a defense through accident, fraud or mistake, and without fault on his part. *Higgins v. Bullock*, 73 Ill. 208; *Warren v. Cook*, 116 Ill. 203.

No one can object to a judgment which he has permitted to be rendered through his own carelessness, neglect or ignorance. *Pray v. Hageman*, 98 N. Y. 351; *Davies v. Mayor et al.*, 93 N. Y. 250; *Smith v. Smith*, 79 N. Y. 634.

By refusing to relieve parties from the consequences of their own neglect it seeks to make them vigilant and watchful. On any other principle there would be no end to the action and there would be an end to all vigilance and care in its preparation and trial. *Ewing v. McNairy*, 21 Ohio St. 322; *Bridge Co. v. Sargent*, 27 Ohio St. 237.

In order to justify a court in enjoining the enforcement of a judgment claimed to have been obtained by fraud, mistake or accident, it is necessary for the complainant to show, in addition to the fraud or mistake relied upon, that it could not have been prevented by the use of reasonable diligence on his part, and that he has been diligent in seeking relief. *Ratliff v. Stretch*, 130 Ind. 282; *Hollinger v. Reeme*, 138 Ind. 363.

If a court has jurisdiction of the subject-matter and parties, it is altogether immaterial when judgment is collaterally attacked or collaterally called in question. How grossly or manifestly erroneous this proceeding may have been, its final order can not be regarded as a nullity, and can not, therefore, be collaterally impeached. *People v. Seelye*, 146 Ill. 189.

JOHN G. IRWIN and JAMES KINEALY, attorneys for appellee.

Where a judgment has been obtained by fraud or undue advantage, equity will relieve, even where relief might be had by motion at law. *Nelson v. Rockwell*, 14 Ill. 375.

An original bill may be maintained to impeach a decree for fraud, or which is manifestly unjust. *Lloyd v. Malone*, 23 Ill. 43; *Johnson v. Johnson*, 30 Ill. 215; *Hinrichsen v. Van Winkle*, 27 Ill. 337; *Gooch v. Green*, 102 Ill. 513.

Such a bill lies either for fraud in fact or fraud in law, and is a matter of right. *Griggs v. Gear*, 3 Gilm. 2; *Gooch v. Green*, 102 Ill. 513; *Boyden v. Reed*, 55 Ill. 464; *Conover v. Musgrave*, 68 Ill. 58.

Even a decree entered by consent of parties may be set aside by showing fraud or mistake. *Flagler v. Crow*, 40 Ill. 414; *Cox v. Lynn*, 138 Ill. 195; *Knobloch v. Mueller*, 123 Ill. 554.

Where a defendant fails to make a defense of which he is ignorant at the time of trial, and is guilty of no negligence in failing to discover the same in time to avail of it, and it would be unconscionable to allow the judgment to stand, equity relieves by setting aside the judgment, either for fraud or mistake. *C. & E. I. R. R. Co. v. Hay*, 119 Ill. 494.

The judgment of the County Court on settlement between guardian and ward, is impeachable for fraud, in a court of equity. *Lynch v. Rotan*, 39 Ill. 14; *Propst v. Meadows*, 13 Ill. 157; *Carter v. Tice*, 120 Ill. 277; *Gillett v. Wiley*, 126 Ill. 312.

To entitle a defendant to relief against a judgment or decree on the ground of fraud or mistake, it must appear that he had a defense upon the merits, and that such defense

was lost to him. If the ground of relief set up is mistake and not fraud, it must be shown that the mistake was not due to the fault of the losing party or his agent; but if fraud is charged, as in this case, a good case for relief is made out by showing that the loss was occasioned by the fraud or act of the prevailing party. This is the rule in cases where there is no relation of trust and confidence. *Ward v. Durham*, 134 Ill. 202.

A settlement upon the basis of an erroneous report is not conclusive on the ward, nor is a receipt for the balance shown by an erroneous report conclusive. After approval of the account by the County Court, the guardian may be charged with the money received which he failed to account for. *Bruce v. Doolittle*, 51 Ill. 103.

A settlement pressed upon wards about the time of their becoming of age by one standing in the place of a guardian should not be sustained except in so far as it is just and fair to the ward. *Lehmann v. Rothbarth*, 111 Ill. 185.

A person having possession and control of an infant's estate is liable to account for the same as if a guardian. *Perry v. Carmichael*, 95 Ill. 519; *Lehmann v. Rothbarth*, 111 Ill. 191.

Courts look upon settlements made by guardians with wards recently come of age with distrust, and will not consider them binding, unless made with the fullest deliberation and the most abundant good faith on the part of the guardian. Where a receipt is given by the ward soon after becoming of age to his former guardian, without a full knowledge of all material facts, he is not concluded. It is only in the absence of undue means used on the part of the guardian to obtain it, and disclosure of all material facts, that a release by the ward will be considered binding. And for an admitted mistake, even where there has been no undue influence, the settlement will be set aside in equity. *Jones & Cunningham's Pr.* p. 270, Sec. 6 and note; *Felton v. Long*, 8 Ired. (N. C.) Eq. 224; *Wickiser v. Cook*, 85 Ill. 69.

Courts of equity will not permit transactions between guardian and ward to stand, even when they have occurred

after the minority had ceased, and the relation thereby actually ended, if the intermediate period be short, unless the circumstances demonstrate, in the highest sense of the terms, the fullest deliberation on the part of the ward and the most abundant good faith on the part of the guardian. This doctrine is abundantly sustained by the authorities. *Carter v. Tice*, 120 Ill. 286; *Jones v. Lloyd*, 117 Ill. 597; *Gillett v. Wiley*, 126 Ill. 310.

A release by a *cestui que trust* will not be binding unless he is first made fully acquainted with his rights, and the nature and full extent of the liabilities of the trustee. Any concealment, misrepresentation or other fraudulent conduct on the part of the trustee will vitiate such a release. This rule is a general one, applying in all relations of trust and confidence, whether the *cestui que trust* is or is not a minor, or under other legal disability. And the burden of proof is upon the trustee to vindicate the transaction from any shadow of suspicion and to show that it was perfectly fair and reasonable in every respect. *Jones v. Lloyd*, 117 Ill. 597; *Gillett v. Wiley*, 126 Ill. 310.

Where there is a relation of trust and confidence, rendering it the duty of the party committing the fraud to disclose the truth to the other party, diligence is not required and *laches* will not be imputed. *Jones v. Lloyd*, 117 Ill. 597; *Harris v. McIntyre*, 118 Ill. 276; *Vigus v. O'Bannon*, 118 Ill. 335; *Gillett v. Wiley*, 126 Ill. 312; *Farwell v. G. W. U. T. Co.*, 161 Ill. 596.

The will of the decedent required the investment and accumulation of the trust fund. The rule as to liability for interest is the same as in case of guardians. This requires that on final settlement annual rest be made in stating the account, and that the interest be added each year and compounded. The court below charged interest only from date of final settlement to date of decree at the rate of five per cent. The account, or rather the assets, were \$7,000 short, and this \$5,000 item was withheld from a date far earlier than the date of final settlement, and interest should have been computed for the whole time it was used by appellant.

We have assigned cross-errors for failure to compute the interest correctly, and insist the ruling of the trial court on this point was contrary to the law as laid down in the following cases: *Bond v. Lockwood*, 33 Ill. 212; *In re Steele*, 65 Ill. 322; *Cheney v. Roodhouse*, 135 Ill. 258; *Kattelman v. Guthrie*, 142 Ill. 357; *Rawson v. Corbett*, 150 Ill. 466.

It is not necessary to remand the case for the error in the computation of interest. The statute authorizes this court, in case of partial reversal, to give such judgment or decree as the inferior court ought to have given. *Starr & Curtis*, Vol. 2, Ch. 110, Sec. 81.

Where the record shows error as to interest merely, resting in computation, reversal is unnecessary. If excessive a remittitur may be entered; if too little interest is allowed, it may be computed by this court and final judgment entered in this court for the correct amount. *Tomlinson v. Earnshaw*, 14 Ill. App. 593; 112 Ill. 312.

MR. PRESIDING JUSTICE CREIGHTON delivered the opinion of the court.

John Anderson, the father of appellant and appellee, died testate April 11, 1876. His will was duly admitted to probate. By the twelfth clause he gave to the heirs of his body, by his wife Margaret, all moneys and personal property remaining after the payment of all other legacies and bequests. Margaret had two (then infant) children by the testator, appellee and a daughter. The will provided that in case of the death of one of these children without issue the survivor should have the deceased one's share. Some time after the death of the testator the daughter died, leaving appellee as the sole residuary legatee. The testator had, by a former marriage, adult children, for whom he provided, either by gifts executed in his lifetime or by provisions in his will. Two of these, appellant and David L., he made executors. They both duly qualified and gave separate mortgages upon their real estate as surety for the faithful performance of their trust. David L. assumed the active management of the trust, but he died within two

years, at which time appellant took sole charge. Appellant was also guardian for appellee during the latter years of his infancy, but appellee did not reside with appellant. By the eleventh clause of the will the testator had provided a legacy of \$5,000 to a son, R. W. Anderson.

David L. made one or two reports to the County Court during his lifetime, and appellant made such reports from time to time thereafter.

After appellee came of age he caused appellant to be cited by the County Court to make final report and pay over the estate in his hands. Appellant appeared and presented a statement which was not satisfactory, and the matter was left open for further investigation. Subsequently the statement was amended by adding to the credit side thereof: "Legacy of R. W. Anderson, paid soon after the death of testator but not credited in former reports, \$5,000." This statement was sworn to by appellant, and the clause of the will providing the legacy produced and a credit for it demanded by appellant. This was accepted as true and correct by appellee and his attorneys and the item allowed to stand to the credit of appellant without further investigation, an order approving the account prepared, the balance appearing to be due paid over, a receipt therefor executed, the account "O. K'd" by the attorneys, and the order entered without contention before the court. This occurred August 15, 1893. On May 20, 1897, R. W. Anderson, having learned that appellant had taken credit for this \$5,000 in his settlement with appellee, claimed he had not received it from the executors, as he in fact had not, and cited appellant to show cause why he should not pay it to him. In answer to this citation appellant set up an ademption of this bequest, by the testator in his lifetime. Upon the trial of this issue, June 7, 1897, appellant produced a receipt dated August 16, 1875, after the will was made and shortly before the testator died, signed by R. W. Anderson to the testator, for \$14,143, covering certain advancements, and also this \$5,000 bequest; and appellant testified that this receipt was with testator's

papers; that David had it until he died; that he had had it ever since David's death; that he had been the only executor since David died, for about sixteen years; that he was with the testator a day or two before he died, and that the testator told him he had settled with all his grown children except himself and David; that R. W. had never made any claim until recently, and that he had never known till that time that he pretended to have a claim against the estate on account of that legacy.

The court held that the proof sustained the defense, and dismissed the citation at cost of R. W. Anderson, the claimant. The judgment stands unappealed from and in full force.

About this time appellee first heard of the fact that this legacy was not a proper charge against the estate and had not in fact been paid by the executors "soon after the death of testator," nor at any other time.

On the 18th day of June, 1895, appellee filed the bill in this case against appellant, setting up the facts, charging, in effect, deception, fraud and mistake, and praying that the settlement made and approved in the County Court be set aside; that the account be restated and the correct amount due ascertained, and for payment to him of the sum of \$5,000, with interest thereon. To this bill appellant made answer, in effect, denying all deception, fraud and mistake; denying that the legacy provided to be paid to R. W. Anderson was in fact adempted and discharged by the testator in his lifetime, and setting up *laches*, and that the proceedings in the County Court upon said account and the order entered thereon are a complete and effectual bar to this proceeding.

The hearing resulted in a decree in favor of appellee for the sum of \$6,071.20.

To reverse this decree appellant brings the case to this court, assigns errors and contends here as set up in his answer and as contended in the Circuit Court. Appellee assigns cross-errors and claims that he should have interest on the \$5,000 for a much longer time than was awarded by

the Circuit Court, and that it should be computed with annual rests. The evidence clearly shows that the bequest to R. W. Anderson was fully paid and discharged by the testator in his lifetime, that it was never a proper charge against the estate that came into the hands of the executors and that it was never paid by them.

The amount of the residuary fund due to appellee was larger by that sum of \$5,000 than it would have been if this legacy had been a charge against the estate which came into the hands of the executor after the death of the testator.

Over three years elapsed after the settlement in the County Court, before the commencement of this suit, and appellant contends that this long delay constitutes *laches*. What constitutes *laches* depends on all the facts. The evidence shows that appellee had no knowledge or information concerning the disposition of the legacy to R. W. Anderson, except what he learned from appellant. But it is said he ought to have made inquiry and learned. Appellant was trustee and guardian, and it was his duty to disclose to his *cestui que trust* and ward the truth. Appellant produced the will and pointed out the clause which in plain terms provided the legacy, and claimed it had been paid by the executors "soon after the death of the testator," and swore to it. This all looked to be true, seemed reasonable, and appellee had, at that time, no grounds to suspect his trustee and guardian.

We are of opinion there was no want of diligence on the part of appellee at the time of the settlement or *laches*, on account of delay in bringing his suit.

Appellant's principal reliance appears to be upon his position "that the proceedings in the County Court upon said accounts and the order entered therein are a complete and effectual bar to this proceeding."

It is true as contended for, that the County Court having full jurisdiction of matters of probate and guardianship, is a court of record, and its judgments are to be upheld by the same presumptions applicable to judgments of other courts

of record; and it is true that a judgment by consent or agreement of a party or his counsel is as binding as if rendered upon trial of issues. But it is also true that a judgment of the County Court on a settlement between guardian and ward or executor or trustee, and *cestui que trust*, is impeachable for fraud in a court of equity; and a judgment by consent or agreement of a party or his counsel is as impeachable in a court of equity as if rendered upon trial of issues.

Appellant contends that the evidence fails to show such fraud as will justify a court of equity in setting aside the settlement and order of the County Court thereon, and cites among other cases, *Dickson et al. v. Hitt*, 98 Ill. 300.

In that case the executor had inventoried some cattle as belonging to the estate, which were claimed by the widow as her separate property, and were given up to her. The executor had also charged and was allowed commissions on some worthless notes which he had not collected.

After final settlement and order of the County Court approving the same, some creditors filed a bill in the Circuit Court to set aside the settlement and order approving the same, and to require the executor to account for the cattle and the commissions. The Supreme Court says: "Whether the cattle allowed by the executor to Mrs. Seaton as her separate property before her husband's death, was in fact her separate property, was a question proper to be raised before the Probate Court on the final settlement, and should have been so presented and determined, and we must presume it was, and adjusted, and if it was not, no excuse is given why it was not. Nor does the evidence show the property belonging to the estate." The executor did not conceal from the court or the creditors any fact and made no false statements. He had inventoried the cattle and he had yielded them up to the widow's claim. These facts were known at the time of the settlement and order. Then there was no evidence that the cattle ever belonged to the estate. Concerning the commissions the court says the County Court erred, but that on the part of the execo-

Anderson v. Anderson.

utor there was no concealment. The whole case turns upon the fact that the executor had concealed no fact, made no false statements, been guilty of no deception, and consequently of no fraud.

On the proceedings in the County Court, in the case before us, appellant concealed the fact that the \$5,000 legacy had been satisfied by the testator in his lifetime, and concealed the evidence, which was in his possession, of that fact, stated that the legacy was a valid charge against the estate that came into the hands of the executors, and produced the clause of the will as evidence of it, stated that the executors had paid it, placed it as a credit to himself, in his account, and swore to it. Appellee and the court were ignorant of the facts concealed, and believed the representations and statements made to be true, and acted on them as true; and thereby appellant secured the settlement and procured the order of the court thereon.

We are of opinion appellant's conduct, under the facts in this case, was such fraud as calls upon a court of equity to set aside the settlement and order of the County Court thereon.

Appellee presses with much force his cross-error, and demands that the decree be so modified as to allow him interest on the \$5,000 for a much longer period than that reaching back to the date of the settlement and order of the County Court, but the evidence does not enable us to fix such date. The estate consisted of many thousand dollars, and much of it must have been many times invested and reinvested; part of the time doubtless idle and earning nothing. We find no means in this record of determining whether or not the interest on this part of the fund is included in the reports made from time to time. We are rather inclined to the conclusion that the interest was all reported, and that the idea of claiming and taking credit for this \$5,000 did not occur to appellant until after his first attempt to settle with appellee.

The decree of the Circuit Court is affirmed.

Royal Insurance Co. v. Alex. Crowell.

1. **EXCESSIVE DAMAGES**—*Admitted by a Remittitur*.—When the jury returns a verdict and the plaintiff enters a remittitur it is an admission on his part that the damages assessed by the jury are excessive.

Action to Recover Damages.—Loss of property by fire. Trial in the Circuit Court of Jackson County; the Hon. JOSEPH P. ROBERTS, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the February term, 1898. Affirmed. Opinion filed August 31, 1898.

A. S. CALDWELL and J. M. HERBERT, attorneys for appellant.

WILLIAM A. SCHWARTZ, attorney for appellee; W. W. BARR, of counsel.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

This suit was brought to recover damages for the loss by fire of the dwelling house and personal property of appellee, insured by appellant to the amounts of \$500 on the house, and \$300 on personal property. A verdict was returned for appellee for \$700. Appellee entered a remittitur for \$177.85. Judgment was then rendered on the verdict, as remitted, for \$522.15. The assignments of error presented in argument by counsel for appellant are, in substance, that the verdict is against the law and evidence, that it is excessive, and that proper instructions asked by appellant were refused by the court.

That the verdict as returned by the jury was excessive is admitted by appellee in entering a remittitur for \$177.85. The court, having heard the testimony in the case and seen the witnesses, did not consider the remainder, \$522.15, excessive. A careful consideration of the evidence, which is conflicting, does not warrant us in saying that the conclusion of the court was incorrect.

Appellant asked the court to give the following instruction, which was refused :

“One of the tests for determining the credibility of a witness is his interest in the result of the suit. As a general rule, a witness who is interested in the result of the suit will not be as honest, candid and fair in his testimony as one who is not interested, but the degree of credit to be given to each and all of the witnesses is a question for the jury alone.”

The instruction was properly refused. There is no such general rule.

The following instruction, offered by appellant, was refused :

“You are further instructed by the court, that the award of the appraisers selected by plaintiff and the insurance company to arbitrate the matter of the value of the house in question, is conclusive as to its value at the time of the fire; and even though you should find the issue for the plaintiff, he can in no event recover more than the sum of \$325, the amount fixed by the appraisers as the value of said house at the time of the fire.”

This instruction should have been given. Both parties by the contract of insurance agreed that the amount of loss on the house should be fixed by appraisers, and the amount was so fixed at \$325. We think, however, that in view of the remittitur, that the refusal to give the instruction is not reversible error. The instruction, if given, would have limited a recovery for the house to \$325. The difference between \$325.55 and \$500, the amount which, under the proof, the jury must have fixed as the value of the house, is \$175.

The remittitur is \$177.85, a sum greater than the difference between \$500 and \$325. Whatever damage, then, appellant suffered by reason of the refused instruction was cured by the remittitur.

Upon a view of the whole case we are not prepared to say that a just judgment was not rendered. Affirmed.

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589	56

Phoenix Insurance Co. v. Homer E. Mills.

1. **INSURANCE—Duty of Insured in Case of Fires—Negligence.**—Outside of any clause in a policy requiring it, it is the duty of the insured to do all he reasonably can to extinguish a fire and to make the loss as small as may be, and when he can extinguish a fire in its incipency and fails to do so, he is guilty of culpable negligence.

2. **SAME—Culpable Negligence on the Part of the Insured.**—While non-feasance by the insured may be culpable negligence, preventing others from extinguishing a fire is actual malfeasance, and will prevent a recovery under a policy of insurance by the wrongdoer.

Assumpsit, on an insurance policy. Trial in the Circuit Court of Jackson County; the Hon. JOSEPH P. ROBERTS, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the February term, 1898. Reversed and remanded. Opinion filed August 31, 1898.

YOUNGBLOOD & BARR, attorneys for appellant.

JOHN M. HERBERT, attorney for appellee; WILLIAM A. SCHWARTZ, of counsel.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

This is an action, on an insurance policy issued by appellant to appellee on a stock of groceries in a building then owned by a Mrs. Frank Hopkins, located in Makanda, Illinois.

The declaration contains three counts—two on the policy and the third the common counts. Appellant filed four pleas, but relies only on the general issue and the third plea, which is as follows:

“And for a third plea in this behalf said defendant says, ‘*actio non*,’ because it says it is further provided in and by said insurance policy, set out in plaintiff’s declaration, among other things, as follows: ‘This company shall not be liable for loss caused by the neglect of the insured to use all reasonable means to save and preserve the property

insured at and after a fire, or where the property is endangered by fire in neighboring premises. And defendant avers that the fire which destroyed the property for which this suit is brought originated in the room or house in which plaintiff's goods were located, and was discovered about eleven o'clock at night; that the store house in which the fire was discovered was locked so parties could not enter; that plaintiff was immediately notified of the fire and came upon the premises, and absolutely refused and forbade any person to enter the building. And defendant avers that at the time plaintiff came to the building, a number of men had gathered at the place, some with buckets of water, and if plaintiff had unlocked his door at that time and permitted the parties present to enter the store with water, they could have extinguished the fire and saved the goods, or nearly all of the goods, from damage and destruction, but defendant avers that plaintiff at that time refused to unlock the door of the building and forbade any person to enter the building, stating that his goods were insured and he wanted pay for them. By reason whereof defendant avers that plaintiff forfeited all right of action against defendant under said policy for the loss of said goods. All of which he is ready to verify," etc.

As this case will have to be reversed and remanded, the evidence bearing upon this plea will not be discussed, except to say that there is evidence tending to show that the fire was slight when discovered; that persons were there with buckets of water and with fire extinguishers, and that it might have been put out if they had been promptly admitted, and that appellee refused for some minutes to let them in, saying his stock was insured, and then when he finally opened the door the smoke and fire were so great that those entering could do nothing.

Outside of any clause in a policy requiring it, the duty of the insured is to do all that he reasonably can to put out a fire and to make the loss as small as may be.

When the insured can put out the fire in its incipency and fails to do so, it is culpable negligence. *Chandler v.*

Worcester F. I. Co., 3 Cushing, 328; Lycoming F. I. Co. v. Rubin, 79 Ill. 407.

While non-feasance by the insured may be culpable negligence, preventing others from putting out a fire is actual malfeasance, and would prevent a recovery by the wrongdoer.

The third instruction given for the plaintiff is misleading. The instruction is as follows:

"While you may believe from the evidence that the plaintiff did not open the door of the building containing the goods in question as soon as he could, yet you can not find for the defendant unless you further believe from the evidence that the refusal to open the door prevented the safe removal of the goods in question."

The instruction commences with the proposition, "while you may believe that the plaintiff did not open the door as soon as he could," and closes with the proposition of a refusal to open the door. The first proposition, if proved, would be merely passive neglect. There is no evidence of such negligence. If any misconduct is proved it is a positive refusal to open the door, and an active interference preventing an entrance into the store by those seeking to enter for the purpose of putting out the fire and saving the goods.

The instruction, too, entirely ignores the question as to whether the fire might have been put out by those present without removing the goods at all. It is also open to inference, that unless the refusal to open the door prevented all the goods from being removed, that it is no defense; or, that if the goods could not have been removed without being damaged, the refusal to open the door would be no defense. The clause of the policy upon which the special plea is based is as follows:

"This company shall not be liable for loss caused directly or indirectly * * * by neglect of the insured to use all reasonable means to save or preserve the property at and after a fire." It was the duty of the insured to save all the property if he could, and if not all, to save as much as he

Ward v. City of Murphysboro.

could, and in the best condition that he could. The safe removal of the goods, as the phrase is used in the instruction, may be understood to mean the removal of the goods without being damaged at all. If the goods could have been removed, although somewhat or partially damaged, but still of value to the insurance company as salvage, and a refusal to open the door prevented their removal, such refusal would be a defense to the extent at least of the amount in value of the goods that would otherwise have been removed, whether damaged or not.

The evidence in this case is of a character that requires accurate instructions. The instruction cited is not accurate and may have misled the jury. Judgment reversed and case remanded.

S. W. Ward et al. v. City of Murphysboro et al.

1. **FIRE LIMITS—Ordinances—Requiring Notice.**—Under an ordinance requiring notice, before a city, or any one representing it, can legally remove a building in process of erection, within the fire limits, it must give to the owner notice to remove it himself, and if it fails to do so, and proceeds to abate and remove the same, it will be liable to the owner for such damages as he may sustain.

2. **WORDS AND PHRASES—"Wooden" and "Frame" Buildings.**—Under an ordinance prohibiting the erection of wooden or frame buildings, the words wooden and frame are interchangeable, one having the same meaning as the other. A wooden building is a frame building, and a frame building is a wooden building.

3. **ORDINANCES—Fire Limits—Notice to Remove Building.**—The notice required by an ordinance to authorize the removal of a building in a summary way, is not for the exclusive benefit of the owners of the property, but is a condition precedent, to be strictly performed by the city, before it or any of its officers are authorized to meddle with the building.

4. **WAIVER—General Doctrine of.**—A party should not be held to waive that which is necessary to constitute a right of action against him, unless it fairly appears from the evidence that he actually intended to waive it, or his conduct has been such as to estop him to deny that he did waive it.

Trespass, for destroying buildings, etc. Trial in the Circuit Court of Jackson County; the Hon. ALONZO K. VICKERS, Judge, presiding. Verdict of not guilty and judgment for defendant. Appeal by plaintiff. Heard in this court at the February term, 1898. Reversed and remanded. Opinion filed August 31, 1898.

STATEMENT.

The fire limits of the city of Murphysboro are fixed and defined by Sec. 1, of Ch. 11, of the City Ordinances.

Section II of the chapter is as follows :

"It shall be unlawful for any person, company, corporation or firm, to erect or build, or to commence the erection, within the fire limits of the city, of any wooden or frame building or structure, exceeding in size eight by ten feet and ten feet in height. And it shall be deemed a violation of this section to erect or commence the erection of any frame building or structure or of any frame addition to any building or structure, within the fire limits, which in dimensions shall be sufficient to exceed in area eighty square feet, or in capacity eight hundred cubic feet, notwithstanding that such building or structure or addition may, as to some of its dimensions, be less than is above specified."

Section VI of the chapter provides as follows : "Whenever the erection * * * of any building or structure shall be commenced within the fire limits of the city contrary to the provisions of sections two, three or four of this chapter, or of either of the same, the city marshal shall forthwith notify the person, company, corporation or firm commencing the same, to desist therefrom, and remove the portion if any thereof already erected; * * * and if such person, company, corporation or firm shall persist in proceeding with the erection * * * of such structure or building for forty-eight hours after such notice, or shall willfully fail, neglect or refuse, for forty-eight hours, to comply with such notice, the city marshal shall proceed to remove such building or the portion thereof, if any, already constructed and all materials therefor as a nuisance, for which purpose he may and is hereby authorized to procure such assistance, and call to his aid such numbers of persons as may be necessary."

In June, 1897, appellants erected within the fire limits of the city a building, sixteen by seventy feet, one story in height, on the south side of and adjoining a brick building already there. The building so erected was a wooden frame structure, the south side, ends and roof of which were covered with wooden sheathing, and the sheathing was covered with corrugated iron, the spaces between the studding being filled with loose brick. As the building was nearing completion, the mayor, marshal and aldermen of the city, assuming to act for the city, without giving plaintiffs notice to remove the building, tore it down, for which act appellants brought this suit in trespass against them, making the city also a defendant.

The defendants pleaded in justification the ordinances of the city above quoted; a trial by jury resulted in a verdict of not guilty; judgment having been entered on the verdict, plaintiffs appealed.

A. B. GARRETT and JAMES H. MARTIN, attorneys for appellants.

GEORGE WALTER and JOHN M. HERBERT, attorneys for appellees.

MR. JUSTICE BIGELOW delivered the opinion of the court.

The grounds relied upon by appellants for a reversal of the judgment, are the giving and refusing instructions. The plaintiffs asked the court to give the jury four instructions, all of which were refused and plaintiffs excepted. The first instruction is as follows:

First. "Before the city, or any one representing it, can legally tear down and remove a building within the fire limits of the city, it is the law that the city shall give to the owners of such building notice to remove it himself, and if the city fails to do this, and then proceeds to abate and tear the same down, it is liable to the owner for such damages as he has sustained, if any is shown from the evidence."

That this instruction is the law and should have been given is too evident to need elucidation.

The second instruction is as follows:

Second. "The court further instructs you that the plaintiffs had a right to show by evidence, if they can, the fact, if such appears to be a fact from the evidence, that the city has permitted similar buildings to be erected and constructed within the fire limits of Murphysboro, as the one alleged to have been torn down by defendants, for the purpose of showing the construction the city and its officers themselves place upon said ordinances as to what buildings it prohibited."

If the officers of the city had tacitly allowed that portion of the city included in the fire limits to be filled with frame buildings no better than tinder boxes, such fact would have thrown no light upon the true construction of its fire ordinance. When the ordinance was duly passed and published it became a law of the city, and the city officers had no more right to disobey the law or suspend it, enlarge or construe it away than any other person.

The instruction was properly refused.

The third instruction was as follows:

Third. "In this case the court instructs you that unless the building erected by the plaintiffs was a wooden building, then the city authorities had no right to tear it down, and your verdict should be for the plaintiffs, in such sum as the evidence shall show he has sustained, if any, by reason of tearing down such building."

The ordinance prohibits the erection of "any wooden or frame building." The words "wooden" and "frame" are interchangeable, one having the same meaning as the other. A wooden building is a frame building, and a frame building is a wooden building. The instruction substantially stated the law correctly, and the court erred in refusing it.

The fourth instruction is as follows:

Fourth. "The court further instructs you that the tearing down of a building within fire limits of a city is an extraordinary remedy provided by ordinances, and before a city or its officers shall be justified in pursuing such a remedy, they must show by the evidence that they have com-

plied strictly with the statute and ordinance under which they seek to justify."

This instruction is clearly the law, and it was error to refuse it. *Louisville v. Webster*, 108 Ill. 414.

The defendants asked and the court gave to the jury one instruction beginning as follows: "The court instructs you that the statutes of the State of Illinois give cities the right to pass ordinances fixing fire limits, and prohibiting the erection of wooden buildings within fire limits. You are instructed that the city of Murphysboro has passed the following ordinances with reference to fire limits." Then follows sections 1, 2, 3, 4, 5 and 6, of chapter 11 of the revised ordinances of the city of Murphysboro. The sections had already been given in evidence by the defendants against plaintiff's objection, and all of them that have any necessary connection with the law or facts of this case we have before quoted.

It is difficult to understand the purpose of giving the instruction, and since it could only bewilder the jury, it was error to give it.

The court of its own motion, gave to the jury the following instructions, viz.:

4. "One of the necessary steps to be taken by the defendants before the right to tear down and remove a building erected in violation of these ordinances, is to give the owner forty-eight hours to desist from work on such building and to remove such part, if any, as may have been erected, and the tearing away of such building without such notice would be wrongful, and make the parties so tearing it down, liable to the owner.

5. While the law requires such notice as the instruction just read described, still this is a provision of law for the exclusive benefit of the property owner, and he may waive his right to such notice expressly, or by his conduct.

6. If the jury find, from the evidence, that the plaintiffs had made up their minds to proceed with such building, regardless of all notices, and that the plaintiff who was in the active management of the erection of such building,

stated to the city marshal that he could bring on his notices, that he intended to proceed with the building, this is evidence tending to show a waiver of notice on the part of the plaintiffs.

7. If you find that the notice was waived by the plaintiffs you should treat the case the same as though a proper notice was given.

10. If the building was such as is prohibited by the ordinances, and was in the fire limits of the city, and the defendants tore the same down after the plaintiffs had waived notice, as explained in these instructions, then the defendants are not guilty and should be acquitted."

The notice required by law, to authorize the removal of the building in the summary way, was not for the exclusive benefit of the owners of the property, but it was a condition precedent, to be strictly performed by the city before it or any of its officers were authorized to meddle with the property.

A notice for an application for an injunction, and two notices to stop further work on the building, seem to have been issued by the city officials, but the latter were not dated, nor is there any return on either showing service. The last notice was issued by the marshal of the city, and he testified that at the time he served it on S. W. Ward they had some conversation, which he details as follows:

"I went and looked into the office and saw Mr. Ward behind the counter. I told him that I had another notice to serve on him, and he said 'All right.' I said, in forty-eight hours from now I will have to tear down the building, and he said, 'Yes, then is when the fun will begin.' I looked at the clock and marked on the notice 1:30 P. M."

Q. "What did he say to you with reference to bringing him any more notices?"

A. "Well, that was the notice before that. He said, if I had any more papers to bring them around; that he was going to put up the building."

S. W. Ward testified that he had no such conversation with the marshal.

This is the only evidence to support the claim that notice to remove the building was waived, and even if a waiver was a question of fact, to be found by the jury, the evidence is insufficient to sustain such a finding.

In *Floyd v. Rathlege*, 41 Ill. App. 370, the court said: "A party should not be held to waive that which is necessary to constitute a right of action against him, unless it fairly appears from the evidence that he actually intended to waive it, or his conduct has been such as to estop him to deny that he did waive it."

The evidence to show that appellant S. W. Ward waived notice to remove the building is very unsatisfactory, while there is no evidence whatever that appellant J. H. Ward did or said anything that tended to show a waiver.

Instruction No. 10 assumes that notice to remove the building had been waived by appellant, and except in cases where the facts assumed have not been controverted, such an instruction has uniformly been held to be erroneous by the Supreme Court.

It was error to give the court's instructions Nos. 5, 6, 7 and 10, and each of them.

For the errors in giving and refusing instructions the judgment is reversed and the cause remanded.

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Samuel C. Smiley, Adm'r, v. Jane Scott.

1. **ASSIGNMENT OF ERRORS—*Errors Not Argued, Abandoned.***—When several errors are assigned, this court will notice only those relied on in appellant's brief and argument, and consider those not urged as abandoned.

2. **ATTORNEYS—*Misconduct in Argument.***—Counsel for plaintiff in his closing argument told the jury that the jury in the County Court had given a verdict for plaintiff of \$2,000. *It was held* that the statement was improper, but as the court so stated to counsel in the presence of the jury, and defendant's counsel did not ask the court to do more, it was not reversible error.

Assumpsit, for labor and services. Trial in the Circuit Court of St. Clair County; the Hon. WILLIAM HARTZELL, Judge, presiding. Verdict

and judgment for plaintiff. Appeal by defendant. Heard in this court at the February term, 1898. Affirmed. Opinion filed August 31, 1898.

STATEMENT.

In July, 1890, appellee, a maiden lady, then about forty-nine years of age, and a niece of deceased, employed by deceased (who was eighty years of age and a widow, residing alone, afflicted with rheumatism, deafness and other ailments incident to old age), as housekeeper, nurse, and general companion, had for about three years taken charge of deceased's house and surroundings, doing all the labor out of doors and in the house, and cared for and nursed deceased to her entire satisfaction. For these services deceased paid her \$3,000. At the expiration of about three years, by consent of deceased, appellee went to Colorado to nurse and care for a sick sister-in-law, and remained absent about six months, when she returned and resumed the duties she had previously been performing, with such added duties as arose on account of the enfeebled condition of deceased, which rendered her wholly incapable of caring for herself, and who needed care day and night, and these duties appellee performed to the entire satisfaction of her aunt, for the period of about three years after her return, and until the death of Mrs. Foreman in April, 1897.

For these services deceased agreed to give appellee her furnished house in the village of O'Fallon, of the estimated value of \$2,000 to \$3,000, and deceased executed a deed of the premises to appellee, but did not deliver it, and they were after deceased's death sold by her only heir for \$1,600.

Appellee filed her claim for \$3,000 against the estate of deceased in the Probate Court of St. Clair County, and after a trial there the case was appealed by the administrator of the estate to the Circuit Court of the county, where appellee recovered a verdict and judgment for \$1,500, from which this appeal has been taken.

G. A. KOERNER and VICTOR K. KOERNER, attorneys for appellant.

Smiley v. Scott.

HAMILL & BORDERS, attorneys for appellee.

MR. JUSTICE BIGELOW delivered the opinion of the court.

Several errors are assigned but we shall notice only those relied on in appellant's brief and argument, and consider those not urged as abandoned. *Chicago City Railway Co. v. Van Vleck*, 40 Ill. App. 367; *Ludwig v. L. C. Huck Malt-ing Co.*, 46 Ill. App. 494.

It is insisted that the court erred in refusing to give to the jury the following instruction asked by the defendant, viz: "The court instructs the jury that even though you believe from the evidence the plaintiff performed the services here sued for, in the hope or expectation of becoming one of the beneficiaries under the will of the said Rebecca Foreman, or of becoming one of the subjects of her bounty in any other way, that that fact does not entitle her to recover."

The pleadings are not in writing, and if any claim of the character mentioned in the instruction was made by counsel in opening the case, or in the argument to the jury, counsel for the defendant could, if he conceived his client injured thereby, have easily asked the court to instruct the jury that there was no evidence before them on which a verdict for plaintiff could be predicated, on the ground that plaintiff performed the services for deceased in the hope or expectation of becoming a beneficiary under the will of deceased, or of becoming the subject of her bounty in any other way. No witness testified to any such thing, but defendant made plaintiff his witness, and proved by her that no such thing was talked of or agreed upon, and that the services were not performed with any such expectations. The instruction was properly refused, because there was no evidence on which to base it, and nothing is preserved in the record showing any other reason why it should have been given.

It is insisted that the judgment should be reversed because the verdict is not supported by the evidence and the law applicable to it, for the reason that plaintiff and deceased were living together as a family, and there was no contract,

express or implied, between them, by which plaintiff had any legal right to demand pay for her services, and a number of familiar cases in this State, ending with *Meyer v. Temme*, *Guardian*, etc., 72 Ill. 574, are cited in support of the contention. If there was no evidence of an express contract to pay wages, and none from which such contract could be implied, the authorities cited would be in point and conclusive; but there is no lack of evidence to sustain either an express or an implied contract.

Some of appellant's evidence tended to prove the existence of a contract to pay wages, though much less than plaintiff claimed, and if the evidence tending to prove a special contract that deceased was to give plaintiff her furnished home for plaintiff's services, were to be disregarded as incredible, there is abundant evidence that the services were rendered at the request of deceased, who expected to pay the reasonable value of them, and this value is shown, by a preponderance of the evidence, to be greater than the sum found by the jury.

Unless the jury took a different view of the value of plaintiff's services than deceased did, they could not have found a verdict for less than they did.

Finally it is insisted the judgment should be reversed, because counsel for plaintiff in his closing argument told the jury that the jury in the County Court had given a verdict for plaintiff for \$2,000. The statement was improper and the court so stated to counsel in the presence of the jury, and defendant's counsel did not ask the court to do more. We do not think the plaintiff received any benefit from the statement, and are of the opinion the judgment should not be reversed because of it, but we are not to be understood as approving such a course even in case of severe provocation.

We find no error in the record requiring a reversal of the judgment, and it is affirmed.

**Clara B. Carter v. James H. Carter, Hardin Carter,
George V. Mechler, Joseph Rickelman, The
First National Bank of Effingham.**

1. **TRIAL BY THE COURT—Findings of Fact.**—Where the judge sitting as a chancellor sees and hears the witnesses, error assigned on his findings of fact must be clear and palpable to authorize a reversal.

2. **DEEDS—What is a Sufficient Delivery.**—Anything which clearly manifests the intention of the grantor and the person to whom it is delivered that the deed shall presently become operative and effectual, by which the grantor loses all control over it, and by which the grantee is to become possessed of the estate, constitutes a sufficient delivery.

Separate Maintenance.—Trial in the Circuit Court of Effingham County; the Hon. SAMUEL L. DWIGHT, Judge, presiding. Hearing and decree for complainant. Appeal by defendant. Heard in this court at the February term, 1898. Affirmed. Opinion filed August 31, 1898.

S. F. GILMORE, W. S. HOLMES and I. B. CRAIG, attorneys for appellant.

WRIGHT BROTHERS, attorneys for George V. and E. I. Mechler, appellees.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

This is a bill for separate maintenance brought by appellant against her husband, James H. Carter. The bill was taken *pro confesso* against him, and after hearing upon answers of other defendants and replications, a decree was rendered for complainant against James H. Carter, that he pay complainant \$75 per month from December 1, 1897, and \$300 for her attorney's fees; that the household and kitchen furniture in a dwelling occupied by complainant be vested in her; that complainant should have a lien securing her separate maintenance decreed her, upon lot 12 and the north $\frac{1}{2}$ of lot 13, in block 17, in Alexander & Little's North Addition to Broughton, now the city of Effingham, subject to a prior lien of Eldorado Mechler for \$2,254.16, and law-

ful interest thereon; and also a lien on certain personal property taken by a writ of replevin by George V. Mechler, subject, however, to a prior lien of George V. Mechler, of \$435.08.

Appellant assigns as errors:

1. That the court erred in decreeing that Eldorado Mechler had any lien for purchase money upon the premises described in the decree.

2. The court erred in finding that Eldorado Mechler had loaned the sum of \$1,800, as set forth in the decree, to James H. Carter.

3. The court erred in decreeing that Eldorado Mechler had a lien prior to complainant upon the premises described in the decree for the said claim of \$1,800 and interest.

4. The court erred in decreeing that George V. Mechler had a prior lien to complainant upon the personal property replevied by him.

This assignment raises questions of both fact and of law. Complainant in her bill alleges that her husband, James H. Carter, in 1895, bought a lot in Effingham and erected a building upon it valued at \$3,000; that he assured her that he had the title to said property conveyed to her and a son and daughter of his; that the title of record shows no title in her; that on August 25, 1896, he deserted her; that he told her then to go to Lostant, Ill., and remain until he should locate in Streator; that on March 25, 1897, she received a letter from her husband in Texas, in which he censured her for coming back to her home in Effingham and directed her to deliver possession of the house to George V. Mechler and the household goods and private library to his son, Hardin Carter; that George V. Mechler pretends to have a mortgage on the office furniture, fixtures, etc., which is a sham, and for the purpose of defrauding her; that she had possession of the office and of its contents and was occupying the house; that said Mechler and Hardin Carter are conspiring together to get possession of the dwelling house and furniture in order to transfer all said property to her husband, James H. Carter; that said Mechler

has sued a writ of replevin to get possession of said office and fixtures and furniture and that the writ is in the hands of the sheriff, etc., and prayed an injunction, which was granted.

George V. Mechler answered, denying all allegations of conspiracy, etc., and alleging that James H. Carter was indebted to him in the sum of \$400, and that he had a chattel mortgage on the office furniture, etc., to secure the debt.

It was agreed that the case of Eldorado Mechler v. Clara B. Carter, for forcible entry and detainer of the real estate described in complainant's bill, should be heard with this case.

Hardin Carter answers, denying all charges of conspiracy, etc.

The court found in its decree that on February 3, 1895, James H. Carter bought from Eldorado Mechler, lot 12 in Little's addition to Broughton, now city of Effingham, for \$350, for which he gave his note, which is now due and unpaid; that said Eldorado Mechler and her husband made and acknowledged a deed for the same to said James H. Carter, but never delivered it and still hold it; that said James H. Carter, in 1895, erected a dwelling on said lot and made other improvements amounting to \$2,500; and with complainant moved into said dwelling, where they resided until he deserted her in August, 1896; that complainant has resided there ever since; that said Eldorado Mechler loaned to said James H. Carter, March 4, 1895, \$1,000; March 30, 1895, \$500; and May 9, 1895, \$300; and took his notes for the same, each note due twelve months after date, at seven per cent interest, which sum so loaned and the purchase price of the lot are still unpaid; that on August 19, 1896, James H. Carter executed his promissory note to said George V. Mechler for \$400, with interest, and on the same day executed and delivered to him a chattel mortgage on the goods replevied by Mechler, and that on the day of the desertion of James H. Carter, he, Carter, delivered the possession of said mortgaged goods to said Mechler; that said mortgage

is a valid lien to secure said \$400 and interest, and that there is now due \$435.05.

In explanation of the replevin writ referred to it may be said that it is claimed that complainant forcibly took possession of the property in the chattel mortgage which the decree finds to have been in the possession of George V. Mechler, and that he commenced proceedings in replevin to recover possession of the same.

Eldorado Mechler is the wife of George V. Mechler, and he testifies that he attended to the business for her.

Mrs. Mechler testified in substance as to the sale of the lot and the loaning of money to Dr. Carter. Evidence was also given as to the financial condition of Mechler and his wife, including the realization of over \$1,000 on building and loan stock in 1895.

In the face of this positive testimony, corroborated by the notes executed by Dr. Carter, we can not say that the finding of the trial judge as to the *bona fide* character of the indebtedness is wrong.

When the chancellor sees and hears the witnesses the error in finding as to fact must be clear and palpable to authorize a reversal. *Coari v. Olson*, 91 Ill. 277; *Long v. Fox*, 100 Ill. 43.

Assuming the finding of the chancellor to be correct, there can be no question as to the right of George V. Mechler to a first lien upon the personal property embraced in the chattel mortgage. Complainant urges, as against Eldorado Mechler's lien upon the house and lot, that although the deed was not actually delivered the title passed to James H. Carter when the deed was signed by Mrs. Mechler and her husband and the note of James H. Carter for the purchase money received by them. It is also claimed, the title having in this way vested in James H. Carter, and complainant and her husband having occupied the house as a residence, that she has acquired a homestead which is not subject to a lien for the purchase money nor for the \$1,800 loaned by Mrs. Mechler and used in building the house.

Carter v. Carter.

If the title to the lot never passed from Mrs. Mechler to James H. Carter it is clear that complainant never acquired an estate of homestead in it. If the lot was not paid for, it is equally clear that, as against complainant, Mrs. Mechler has a vendor's lien for the purchase money. If the deed was not delivered, and was by agreement not to be delivered until the purchase price and the borrowed money was paid, and to this effect there is uncontradicted testimony in the case, complainant has no claim, legal or equitable, to said property until payment of these sums is made. This is the finding and effect of the decree. When payment is made to Eldorado Mechler of the amount found to be due her, the decree gives to complainant a first lien upon the property to secure her separate maintenance. The same is true as to the personal property mortgaged to George V. Mechler.

The authorities cited by appellant in support of the proposition that title passed to James H. Carter are not pertinent under the facts in evidence in this case. The proposition, as stated by counsel for appellant is, "Mrs. Mechler parted with the title when she accepted the note for purchase money, and she could not recall it."

We do not so understand the law. In *Benneson v. Aiken*, 102 Ill. 287, it is said, "Anything which clearly manifests the intention of the grantor and the person to whom it is delivered that the deed shall presently become operative and effectual—that the grantor loses all control over it, and that by it the grantee is to become possessed of the estate—constitutes a sufficient delivery."

The evidence in this case fails to meet these conditions.

Mechler's testimony is: "We didn't take a mortgage on the premises for the reason he didn't want to give a mortgage, for he did not want it known he had to borrow money. I asked him about taking the deed, and he said he didn't want to put the deed on record on account of the Cooper trouble, or give a mortgage, and would leave the deed with my wife until he paid the indebtedness."

This not only fails to show a delivery, but expressly shows

that there was no delivery, and that there was not to be until the indebtedness to Eldorado Mechler was paid.

Finding no error in the record, the judgment of the court is affirmed.

John H. Schroeder v. A. B. Clarke et al.

1. APPELLATE COURT PRACTICE—*The Record Must Show the Error.*—Where the record presents no error that can be judicially seen, the judgment must be affirmed.

Assumpsit, on a promissory note. Trial in the Circuit Court of Randolph County, on appeal from a justice of the peace; the Hon. GEORGE W. WALL, Judge, presiding. Verdict and judgment for defendants. Error by plaintiffs. Heard in this court at the February term, 1898. Affirmed. Opinion filed August 31, 1898.

STATEMENT.

For some time prior to March 21, 1895, defendant A. B. Clarke had been, and at that time was, indebted to plaintiff in the sum of \$238.52 for saloon supplies, and had applied to plaintiff for employment as a traveling salesman, by which to pay the debt, and had received encouragement to that effect.

On the before named date, plaintiff sent his traveling salesman, a Mr. Hoffman, to make arrangements with Clarke looking toward his employment. Hoffman had an interview with defendants, which terminated with the execution by them of two notes of \$119.26 each, to plaintiff, dated March 21, 1895, and due in three and six months respectively, with seven per cent interest, and a parol understanding that A. B. Clarke should be employed by plaintiff, and should have certain territory in which to travel, and that one-half of each month's wages earned by him should be applied on the notes until they were paid.

Soon after giving the notes, Clarke received from plaintiff the following letter:

Schroeder v. Clarke.

“ST. LOUIS, Mo., 3/30/1895.

I agree to pay A. B. Clarke seventy-five dollars (\$75) per month, if he sells \$2,000 per month, and allow him \$4.00 per day for working days, and if he sells more than that amount, I am supposed to pay him more, and if he sells less than that, he is supposed to receive the amount according to his sales, and to hold his salary as part payment on the notes, if he makes success, and to receive prices as I give him.

JOHN H. SCHROEDER.”

Clarke immediately entered plaintiff's employ selling goods, and testifies, for a short time did well, but that soon plaintiff sent another salesman into his territory, who took his trade from him; that he was ready and willing at all times to perform his part of the contract, but was prevented from doing so by the acts of plaintiff, and that finally, on November 7th of the same year, he was discharged without his fault, but as to these matters the evidence is conflicting.

This suit was brought on one of the notes, before a justice of the peace, and the case was afterward appealed to the Circuit Court, where a trial was had which resulted in a verdict and judgment in favor of defendants, and the plaintiff brings the case here by writ of error and assigns three errors. “1st. The court erred in giving each of the instructions for the defendants. 2d. The court erred in refusing to set aside the verdict of the jury. 3d. The court erred in overruling plaintiff's motion for a new trial, and in rendering judgment on the verdict of the jury.”

WM. HARTZELL and J. B. SIMPSON, attorneys for plaintiff in error.

A. G. GORDON, attorney for defendants in error.

MR. JUSTICE BIGELOW delivered the opinion of the court.

As to the first assignment of error, it is sufficient to say, that since none of the instructions are abstracted, this court may presume it has been abandoned. This is a more char

itable view to take of the matter, than to suppose counsel for plaintiff in error purposely disregarded Rule 23 of this court.

The second and third assignments of error are practically but one, and challenge only the ruling of the court in overruling plaintiff's motion for a new trial, and on looking into the record, as the motion also is not abstracted, we find the grounds of it to be as follows:

1st. "Because the verdict of the jury is contrary to the evidence." 2d. "Because the verdict of the jury is contrary to the law." 3d. "And for other good and sufficient reasons appearing," etc.

As to the first point of the motion, there was abundant evidence (such as it was, and none of it was objected to) before the jury to warrant them in finding the verdict as they did, and the most that can be said of it in favor of plaintiff's contention is, that it was conflicting, and there was no decided preponderance either way, and hence the court did not err in overruling the motion for the reason given.

As to the second point of the motion, if it means that the verdict is contrary to the law, as given to the jury by the court, we have looked into the instructions sufficiently to be enabled to determine that the point is without foundation.

If it means that there was no evidence before the jury that would legally justify the jury in finding the verdict they did, then the contention is also without foundation as before shown.

As to what "reasons" were urged to the court below on the third point of the motion for a new trial, we have no means of knowing. Possibly it was the admission of parol evidence, as that seems to be the principal point raised here, but plaintiff in error neither objected to the evidence at the time it was given, nor did he ask to have it excluded from the jury. Under such circumstances the record presents no error that can be judicially seen.

The judgment is affirmed.

Baltimore & O. S. W. Ry. Co. v. Minnie Slanker.

1. **RAILROADS—Must Stop Trains a Sufficient Time to Allow Passengers to Alight.**—It is the duty of a railroad company to stop its trains at a depot a sufficient length of time to enable the passengers who desire to alight to do so in safety.

2. **VERDICTS—On Conflicting Evidence.**—A verdict will not be set aside whenever there is a contrariety of evidence, and the facts and circumstances, by a fair and reasonable intendment, will authorize the verdict, notwithstanding it may appear to be against the weight of the testimony.

3. **EVIDENCE—Extent and Duration of Bruises.**—Where the declaration charges, among many other injuries, that the plaintiff was bruised upon her body, the extent and duration of any injury resulting from a bruise upon any part of the body, received as part of the injury complained of, may properly be proven.

Trespass on the Case, for personal injuries. Trial in the City Court of East St. Louis: the Hon. BENJAMIN H. CANBY, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the February term, 1898. Affirmed. Opinion filed August 31, 1898.

POLLARD & WERNER, attorneys for appellant.

JESSE M. FREELS and A. R. TAYLOR, attorneys for appellee.

MR. PRESIDING JUSTICE CREIGHTON delivered the opinion of the court.

This was a suit by appellee against appellant in the City Court of East St. Louis, to recover damages for personal injury.

The declaration states that appellee on the 10th day of May, 1896, became a passenger on appellant's train at Olney, Illinois; that appellant undertook to carry her safely to the relay depot in East St. Louis, Illinois, and there allow her time and opportunity to alight in safety; and she charges, in substance, that upon reaching her destination, the cars were stopped for passengers to get off, but that before she

had reasonable time and opportunity safely to do so, the cars were started forward with a sudden jerk, which threw her from the car to the ground, and greatly and permanently injured her; that her ankle and foot were crushed and the bones broken, her head lacerated, and that she was bruised upon her body. To the declaration appellant pleaded not guilty. Trial by jury. Verdict in favor of appellee for \$6,750. Appellee remitted \$1,750, and the court rendered judgment on the verdict for \$5,000.

To reverse this judgment appellant urges: That there is no substantial evidence tending to prove the negligence charged in the declaration; that the verdict is against the weight of the evidence; that the court admitted improper evidence, and that the court erred in giving the first and second instructions asked by appellee.

Counsel for appellant contend that the law is:

"Where there is no substantial evidence tending to prove a material issue of fact essential to be proved that plaintiff may recover, the court should direct a verdict for the defendant."

This is a very correct statement of the law as we understand it.

The negligence charged, and which, in order that appellee may recover, there must be some substantial evidence tending to prove, is:

That appellant did not allow to appellee sufficient time and opportunity to safely alight from the car at her journey's end; and that after stopping to let her get off and before she had reasonable time to safely do so, the cars were started forward with a sudden jerk, throwing her off.

The train consisted of eight or ten cars, and had from 470 to 480 passengers aboard. It was an excursion train.

Appellee testified: "When the conductor took up my ticket I told him I was going to get off at East St. Louis, and asked how many stops before the relay, and whether time would be given passengers to alight there. He said the train would make three stops; first, to register; second, to change engines; and third, at the relay, and ample time

given for passengers to alight, and asked me if I was going to East St. Louis. I said yes, and he said, 'I will take your bridge ticket,' and he did.

On reaching East St. Louis the first stop was at Cone's to register, then about half way between that station and the relay, to change engines. Then the train slowed up for the relay station. I saw the passengers were getting up to make ready to leave the car. I got up and stood between the seats as the train stopped. * * * When the car came to a stop I went out from the car. There were passengers ahead of me, getting out. I followed within reasonable distance, two or three feet. * * * I got out the forward end of the car. The train was standing still until I was on the platform of the car; * * * then the train started and I was thrown off the car. I was thrown against the end of the car and from there off. The car started suddenly; the effect was to throw me off. It all happened so quick, I don't know that I can state exactly, but there was sufficient shock to jar my left shoulder, when I struck the end of the car."

R. G. Morris testified: "I reside in Olney; was passenger in same car as plaintiff. I sat * * * right opposite her seat; * * * when the train came to the relay depot and slowed up I saw Mrs. Slanker get up and stand in the aisle. I think the train had not got to a stop when she got up. The car was full of passengers, some standing in the aisles; * * * plaintiff followed the people who preceded her out of the door; she was right behind them."

A. A. Shannon testified: "Live at Mt. Erie. Saw Mrs. Slanker in car on the day in question talking to Dr. Morris. * * * Saw her afterward when she fell from the train. There was quite a crowd in the car and they all got up and commenced going out; she was the last on the front end of the car, going out. The car was standing still when Mrs. Slanker passed out from her seat to the front end to the platform. She was probably two or three feet behind the next preceding passenger; about as (close as) convenient for her to be." He also testified that he was sitting right by a raised window when she passed out, and just turned

his head and looked out of the window and saw her fall head-foremost; that just about that time the car had moved up, not very fast, kind of easy kind of a jerk.

The testimony is conflicting as to the length of time, by the clock, the train did stop at the station. The conductor says, "We made an ordinary passenger stop."

In our judgment there is, in this record, substantial evidence tending to prove the negligence charged. It was the duty of appellant to stop its train at the relay depot a sufficient length of time to enable all the passengers, who desired to do so, to alight in safety. Appellee was especially assured by the conductor that ample time would be given at the relay depot for passengers to alight. The testimony shows that as soon as the train began to slow up for the station, appellee got up and stood between the seats, ready to start out when the train should stop; that she followed along behind those in front of her as closely as she conveniently could, and passed out of the car door while the train was yet still, and that immediately on reaching the platform of the car, and before she could step down from it, the train started up with such force as to throw her off.

That a passenger exercising the diligence the evidence shows appellee was exercising, was unable to alight between the stopping and starting of the train, raises the presumption that the train did not stop a sufficient length of time. The conductor's testimony corroborates appellee on this branch of her case. He says he made the ordinary passenger stop. This was not an ordinary passenger train. It was an excursion train, composed of eight or ten passenger coaches, carrying 470 to 480 passengers, and it appears from the evidence that many of those at least who were in the car with appellee wanted to get off the train at the relay depot. An ordinary passenger stop might not, and if this was in fact such stop, the evidence shows that it did not, meet the reasonable requirements of this extraordinary occasion.

It is urged that the verdict is against the weight of the evidence.

There is in this record "substantial evidence tending to prove every material issue of fact essential to be proved that plaintiff may recover." Where there is a conflict of evidence, it is the province of the jury to determine and say where the truth is. In *I. C. R. R. Co. v. Gillis*, 68 Ill. 319, our Supreme Court has said:

"If any rule of this court can be so well established as to be neither questioned nor require the citation of authorities to support it, it is that a verdict will not be set aside whenever there is a contrariety of evidence, and the facts and circumstances by a fair and reasonable intendment will authorize the verdict, notwithstanding it may appear to be against the strength and weight of the testimony."

The court admitted evidence concerning the development of a tumor on the breast of appellee after the injury. Appellant contends this was error because special damage is not alleged in the declaration.

The declaration charges, among many other injuries, that appellee was "bruised upon her body." Under that averment we are of opinion the extent and duration of any injury resulting from a bruise upon any part of her body, received as part of the injury complained of, may properly be proven. The testimony of the physicians tends strongly to prove that the tumor resulted from a bruise, and appellee testifies that she received, at the time of the injury complained of and as part of the injury, a bruise on that part of her body, and that she had never at any other time in her life received a bruise on that part. But if this is not proper, under the declaration as it is, it in no way affects appellee's right to recover; it goes only to the extent of the damages; and appellant nowhere contends that the amount of damages for which judgment, after the remittitur, was finally rendered, is excessive—nowhere, in this record, argues that if appellee has a right to recover at all, that she has recovered too much. Wholly independent of the testimony concerning the tumor, she is very badly injured and disabled for life.

Appellant complains of the first instruction given on behalf of appellee. It is as follows:

"No. 1. If the jury find from the evidence in this case that the defendant received the plaintiff as a passenger upon its car at Olney, Illinois, on defendant's line of railway, to be carried as a passenger to the relay station or depot in East St. Louis on defendant's line of railway, then it was the duty of the defendant, by its servants in charge of the engine and train of cars on which plaintiff was such passenger, to have carried the plaintiff to her point of destination, and to have there stopped the train a sufficient length of time to have allowed the plaintiff to leave said car safely while using ordinary care and diligence to do so. And if the jury in this case find, from the evidence, that defendant's servants in charge of the train on which plaintiff was such passenger did stop said train at the relay station to enable passengers to alight therefrom, and that while said train was so stopped to enable passengers to alight from said train, the plaintiff left her seat and was proceeding to alight from said train, and if the jury further find from the evidence that while the plaintiff was on the platform of defendant's car, seeking to get off said car, and while she was using ordinary care and diligence in that regard, defendant's servants in charge of its cars caused said car on which the plaintiff was such passenger to be started forward with a sudden jerk before the plaintiff could alight from said car while using ordinary care, and that thereby the plaintiff was caused to be thrown or fall from said car and sustained the injuries on account of which she sues, then the defendant is liable, and the verdict should be that the defendant is guilty." Given.

It is urged against this instruction that it assumes that if the car started with a sudden jerk such fact was negligence; that such jerks may result from the usual movement of trains; and that whether or not it is negligence in a particular case is a question of fact.

The substance of the negligence charged in this case is, the failure of appellant to stop its train at the station of appellee's destination a sufficient length of time to allow her to safely alight, and after having stopped it, and while

appellee was in the act of alighting, before she had time to do so, starting forward the train with such sudden jerk as threw her off. The principal element of negligence in this charge is, the starting of the train while appellee was in the act of alighting, without having given her a reasonable time in which safely to alight. The manner of starting is important only to the extent of its agency in causing her to be thrown or to fall from the car. This case does not depend upon whether or not the jerk, as a wholly independent circumstance, was of itself an act of negligence. It was a danger-producing incident of the principal act of negligence. Appellee testifies: "The train was standing still until I got on the platform of the car." "The car started suddenly; the effect was to throw me off." "There was sufficient shock to jar my left shoulder when I struck the end of the car." Mr. Morris testified in substance that the car started up with a kind of easy jerk.

The testimony clearly tends to prove that while appellee was in the act of alighting, and before she had time safely to do so, the car suddenly started with such jerk and force as to throw or cause her to fall from the car. It is further urged against this instruction that it allows a recovery for a cause not alleged in the declaration. To our minds this objection is not well taken. We are of opinion the instruction fairly submits the case to the jury upon the charges made in the declaration.

Complaint is also made of appellee's second instruction. We are of opinion that it is fully supported by the evidence and the just inference that may properly be drawn therefrom—that it is a substantially correct statement of the law, arising out of such facts as the evidence tends to prove; and besides, it applies only to the amount of damages, and, as above said, it is not urged here that the amount of the judgment, as finally rendered, is excessive.

The judgment of the trial court is affirmed.

City of East St. Louis v. Mary Mahoney.

1. **VERDICTS—Conclusive.**—When the questions at issue have been fairly submitted to a jury, and there is evidence to sustain the verdict, the judgment based upon it will be affirmed.

Trespass on the Case, for personal injuries. Trial in the City Court of East St. Louis; the Hon. BENJAMIN H. CANBY, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the February term, 1898. Affirmed. Opinion filed August 31, 1898.

FORMAN & BROWNING, attorneys for appellant.

M. MILLARD and F. C. SMITH, attorneys for appellee.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

Action by appellee for damages sustained on account of defective sidewalk.

Declaration in usual form, and plea of not guilty. Verdict and judgment for appellee for \$500.

The only questions presented in the brief and argument of appellant are questions of fact. They have been fairly presented to the jury and there is evidence to sustain the verdict. The law is so well settled that in such cases the verdict must stand, that citation of authorities is not necessary. Judgment affirmed.

City of East St. Louis v. Mary Donahue.

1. **ORDINARY CARE—What is Not a Want of.**—A person who receives an injury on account of a defective sidewalk is not necessarily precluded from recovering damages therefor merely because of his previous knowledge of the defect, but such knowledge is an element for the jury to consider in determining the question of ordinary care.

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City of East St. Louis v. Donahue.

2. *SAME—Exercise of—How Determined.*—The question whether the plaintiff was exercising ordinary care for her own safety can only be determined from the facts and circumstances surrounding and connected with the accident.

Trespass on the Case, for personal injuries. Trial in the City Court of East St. Louis; the Hon. BENJAMIN H. CANBY, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the February term, 1898. Affirmed. Opinion filed September 9, 1898.

FORMAN & BROWNING, attorneys for appellant.

A. FLANNIGEN and MESSICK & MOYERS, attorneys for appellee.

MR. JUSTICE BIGELOW delivered the opinion of the court.

The record in this case comes here by appeal from the City Court of East St. Louis, in which appellee recovered a judgment against appellant for \$200 damages on account of the negligence of appellant in allowing a sidewalk of the city to become and remain out of repair and in a dangerous condition for travel for a considerable length of time, in consequence of which appellee, in traveling over it and while in the exercise of ordinary care, fell through the walk, severely spraining her ankle, rupturing the ligaments of it so that she was unable to walk for about two months, and, in the cure of it, contracted a medical bill of about \$40.

The assignments of error, and appellant's brief and argument, only question the ruling of the court in overruling appellant's motion for a new trial, based solely on the ground that appellee testified that she had known for some time prior to getting injured that the sidewalk had been out of repair, and did not testify that at the time of the accident she was exercising ordinary care for her own safety.

If, as seems to be contended, a person knowing a sidewalk to be out of repair and attempting to travel on it does so at his own risk of being injured, the contention is correct. In this case, as in thousands of others, the occupants of premises are so situated that they can not leave their own doors

without going over sidewalks which they know are more or less out of repair, and must it be said that, if they do leave under such circumstances, they are remediless if they are injured on a sidewalk that a city knows to be defective, no matter how careful they may have been in traveling on it? Such is the logical deduction from the rule contended for, and the case of *Village of Kewanee v. Depew*, 80 Ill. 119, is cited and relied upon as supporting the contention. That case holds no such rule. The real point on which the case turned was, that while Depew knew the walk on which he was traveling was in a dangerous condition, he also testified to facts showing conclusively that at the time, he was grossly negligent of his own safety, by giving his entire attention to observing a passing team, in order to satisfy his curiosity in regard to the style of harness used upon it. The court did not hold that because he knew the sidewalk was in a dangerous condition he could not recover, but it barred him from recovering because, while knowing of the danger ahead of him, he furnished the affirmative evidence that he was not exercising ordinary care in traveling over the walk, which is far different to what his case might have been had he furnished no such evidence on the subject of due care.

It is not the law that a person who receives an injury on account of a defective sidewalk is precluded from recovering damages therefor merely because of previous knowledge of the defect, but such knowledge is an element for the jury to consider in determining the question of ordinary care.

It is true appellee did not testify in terms, that she was exercising ordinary care at the time she was injured, and had she done so, such testimony would have been improper. The question whether she was exercising ordinary care for her own safety could only be determined from the facts and circumstances surrounding and connected with the accident, and these were in evidence before the jury, and were such as to warrant the jury in finding as they did.

There is no error in the record and the judgment is affirmed.

Jesse French Piano & Organ Co. v. Meehan.

Jesse French Piano and Organ Co. v. John Meehan.

1. **APPELLATE COURT PRACTICE—Office of the Assignment of Errors.**—An assignment of errors in the Appellate Court performs the same office as a declaration in a court of record of original jurisdiction. It would be as regular and proper for a Circuit Court to render judgment in a case where there is no declaration, as for the Appellate Court to reverse a judgment where there is no assignment of errors.

2. **SAME—Failure to Assign Errors.**—The failure to assign errors upon the record is not a mere form that will be considered waived if not objected to, but one of substance.

Replevin.—Trial in the Circuit Court of Madison County; the Hon. MARTIN W. SCHAEFFER, Judge, presiding; finding and judgment for plaintiff; appeal by defendant. Heard in this court at the February term, 1898. Affirmed for a failure to assign errors upon the record. Opinion filed August 31, 1898.

SILAS COOK, attorney for appellant.

BURROUGHS & BROTHER, attorneys for appellee.

MR. PRESIDING JUSTICE CREIGHTON delivered the opinion of the court.

This was an action of replevin by appellant against appellee to recover a piano. This suit was commenced before a justice of the peace in Madison county and appealed to the Circuit Court, where a jury was waived and the cause tried by the court by agreement, resulting in a finding and judgment for appellee.

Appellant brings the case to this court, but fails to assign error.

“An assignment of errors in this court performs the same office as a declaration in a court of record or original jurisdiction. It would be as regular and proper for a Circuit Court to render judgment in a case where there is no declaration, as for this court to affirm or reverse a judgment where there is no assignment of error.” Williston v. Fisher, 28 Ill. 43; Conlon v. Manning, 43 Ill. App. 363.

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"The failure to assign errors upon the record is not a mere form that will be considered waived if not objected to, but one of substance; and should the court, for instance, inadvertently reverse for error not assigned, it would feel compelled on motion to set aside its judgment." *Ditch et al. v. Sennott et al.*, 116 Ill. 288; *Lang v. Max*, 50 Ill. App. 465.

The appeal will be dismissed at costs of appellant.
Appeal dismissed.

James T. Tartt, Adm'r, v. Eugene Wahl and Otto Bauer.

1. *ADMINISTRATION OF ESTATES—Credits for Money Charged by Misapprehension.*—Where an administrator charged himself with pension money as assets of the estate, due to his intestate, but not collected at the time of her death, and afterward learned that accrued pensions were not to be considered as assets of the estate of a deceased pensioner, it was held that he was entitled to be credited with the amount in his final report.

2. *INJURIES—From Mere Negligence—Privity Necessary to a Recovery.*—In an injury arising from mere negligence, however gross, there must exist between the party inflicting the injury and the one injured, some privity, by contract or otherwise, by reason of which the former owes some legal duty to the latter.

In Probate.—Appeal from the Circuit Court of Madison County; the Hon. MARTIN W. SCHAEFFER, Judge, presiding. Heard in this court at the February term, 1898. Reversed. Opinion filed August 31, 1898.

STATEMENT.

Mrs. Eugene Wahl was a government pensioner, and as such received \$12 per month, payable every three months. For a number of years prior to her death, appellant was her conservator, and at her death, which occurred August 26, 1895, he became, by virtue of an act approved June 7, 1895, and in force July 1, 1895, the administrator of her estate.

At the time of the death of his ward, two installments of her pension, one due April 1st, and the other due August

1, 1895, were uncollected, but in making his report to the County Court soon after her death, appellant charged himself with the two sums, amounting to \$72, and took credit for commission thereon at six per cent, but afterward, when he came to apply for it, he found that, by an act of Congress approved March 2, 1895, it was provided that accrued pensions should not be considered a part of the assets of the estate of a deceased pensioner, and where the pensioner was a widow and left no child under sixteen years of age surviving, only so much of such accrued pension should be paid or allowed as might be necessary to reimburse the person bearing the expenses of the last sickness and burial of the pensioner, in case her estate proved insufficient for such purpose; and as the ward left no child under sixteen years of age, and her estate rendered unnecessary any such allowance, the government refused to pay the uncollected pension. After the expiration of two years from the death of his ward, when appellant made his next report looking to a final settlement of the estate, he credited himself with the \$72 uncollected pension, and charged himself with the commission that he had taken credit for in his former report; and appellees appeared before the County Court and excepted to the item of \$72 credit, but that court disallowed the exception and approved the report. From this order, appellees appealed to the Circuit Court of Madison County, which ordered said \$72 to be added to the report without reference to the commission appellant had charged himself with, to which order appellant excepted and appealed to this court, and assigns for error the order charging appellant with \$72.

TRAVOUS & WARNOCK, attorneys for appellant.

KEOME & TERRY, attorneys for appellees.

MR. JUSTICE BIGELOW delivered the opinion of the court. There is no question that appellant never in fact received the money, but it is insisted on the part of appellees, who

seem to be the heirs of the deceased pensioner, that the money was lost through the negligence of appellant. It is not easy to see that a thing can be lost that has not been first gained; and certainly, so far as appellees are concerned, it never had been gained by them, nor had they ever any right to it whatever. It was not property, even as to the pensioner herself. Until it was received in fact, it was a proffered gift of the government, that could be recalled at any time. It had no likeness to a debt owing to the ward.

It is true that the property that appellees would probably have inherited, had the money been received by appellant, would have been greater than it now is, but that is not a sufficient reason why appellant should be compelled to pay it. He owed no duty to appellees. He had secured no benefit to himself at their expense, and there was no privity between himself and appellees. *Winterbottom v. Wright*, 10 Mees. & Wel. 109; *Buckley v. Gray*, 110 Cal. 339. In the latter case the defendant, an attorney at law, was employed by plaintiff's mother to draw her will, which she directed should be so drawn as to leave all the residue of her estate to plaintiff and a brother, to the exclusion of the children of a deceased son. The defendant not only drew the will so negligently that the grandchildren took under it, but also had the plaintiff, though named in the will as a devisee, subscribe it as a witness to it, whereby its provisions were made void as to him, and the property which plaintiff failed to get on account of the negligence of the defendant amounted to \$85,000. In deciding the case the Supreme Court of California said: "The rule is universal, that for an injury arising from mere negligence, however gross, there must exist between the parties inflicting the injury and the one injured, some privity, by contract or otherwise, by reason of which the former owes some legal duty to the latter."

The fact was plainly evident that plaintiff's mother intended that plaintiff should be benefited as a result of her contract with defendant in drawing her will, and as to this the court said: "Although the ultimate consequen-

tial injury to the plaintiff would appear to have been great, it was, so far as defendant is concerned, *damnum absque injuria*, against which courts are powerless to relieve."

No right of action ever accrued to the ward, and there was nothing to survive to her heirs, hence it is not necessary to inquire what actions survive under the statutes.

We hold that appellant bore no such relation to appellees as would give them a right of action to recover of him the amount of the unpaid pension, on the ground that he was negligent in not collecting the money, even if it be admitted that appellant was grossly negligent in the matter, which we are not prepared to hold.

The jurisdiction of the County Court to try the question whether appellant was grossly negligent in not collecting the two installments of pension has not be raised, and we express no opinion upon it, further than to observe that if it had not, the Circuit Court did not get jurisdiction of the question by appeal.

Because the Circuit Court erred in ordering the item of \$72 to be charged to appellant in his report, the order of that court is reversed, and the order of the County Court is affirmed.

Illinois Central Railroad Company v. Green King.

1. **MASTER AND SERVANT—Responsibility for Misconduct of the Servant.**—For the acts of the servant within the general scope of his employment, while engaged in his master's business, and done with a view to the furtherance of that business and the master's interest, the master will be responsible, whether the act be done negligently, wantonly or even willfully. In general terms, if the servant misconducts himself in the course of his employment, his acts are the acts of the master, who must answer for them.

2. **SAME—Responsibility for Malicious Acts of the Servant.**—Where a servant is doing an act falling within the scope of his employment, if he also wreaks vengeance on the person or thing he is dealing with, and it is impossible to determine where the sense of duty terminates and a thirst for vengeance begins, the master is responsible for the act as a unit. The master is presumed to have possessed himself of a knowl-

77	581
179	91
77	581
84	206

77	581
105	633

edge of the quality of a servant before employing him, and can not be held blameless in putting him in a position where, in doing his master's services, he also unnecessarily, intentionally and wickedly injures another.

8. *INSTRUCTIONS—Requiring a Jury to Examine the Pleadings.*—The court dislikes to sanction the practice of sending a jury to examine a declaration to find out if the facts proven fit it.

4. *SAME—Duplicate Instructions.*—It is not error to refuse to instruct the jury more than twice on the same point.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Washington County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the February term, 1898. Affirmed. Opinion filed August 31, 1898.

STATEMENT.

By his declaration, in an action on the case, Green King, by his guardian, Lewis Mundinger, sued appellant for forcibly, wantonly and maliciously pulling, pushing and throwing him from and off the cars of appellant's railroad, while they were in motion and increasing in speed, and for assaulting and hitting him with a stone thrown by a servant of appellant, while engaged in pulling appellee off the car, whereby appellee's foot was caught under the wheels of the car and crushed.

The immediate facts are that appellee, a colored boy, thirteen years of age, was making his way from Chicago to the South and undertook to secure transportation on appellant's road from Ashley, a station on the railroad, to Cairo, without paying his fare, and he had climbed upon the rods under the bottom of a freight car, near or over the trucks, from which, after the train had started from the station, he fell, or was pushed or pulled by a brakeman of the train, and his foot caught under the wheels of the moving car and was crushed, so that it became necessary to amputate it. He recovered a verdict of \$2,000, on which the court, after overruling a motion for a new trial, rendered judgment, and the railroad company brings the case here by appeal, and assigns as errors, that the evidence is insufficient to sustain the verdict, and that the court

erred in giving plaintiff's instructions, as well as in refusing to give instructions asked by defendant.

GREEN & GILBERT, attorneys for appellant.

If a servant go beyond his employment, and without regard to his service, act maliciously, or, in order to effect some purpose foreign to his service, commit a trespass, or injure another, the master is not liable. *Thomas on Negligence*, 13; *Mott v. Consumer's Ice Co.*, 73 N. Y. 543.

Where the master owes no duty to the injured party and his liability only arises as a legal conclusion from the relation of master and servant, he is not liable for his servant's malicious trespass or criminal act, where such servant, in performing such act, has not as his motive the furtherance of the master's business. *Vide Wright v. Wilcox*, 19 Wend. 343; *Mali v. Lord*, 39 N. Y. 381; *Sanford v. Eighth Avenue R. R. Co.*, 7 Bos. 122; *Croft v. Allison*, 6 E. C. L. 614; *N. & C. R. R. Co. v. Starnes*, 9 Heisk. 52; *McKeon v. Citizens Ry. Co.*, 42 Mo. 79; *Story on Agency*, Sec. 456; *Angell on Carriers*, Sec. 684.

Where the authority given the servant only authorizes the employment of usual and lawful means, the master is not liable for illegal and criminal acts on the part of the servant. *Crocker v. N. L. & C. Ry. Co.*, 24 Conn. 249; *Noyes' Maxims*, Chap. 44; *Lyon v. Martin*, 8 A. & E. 512; *Poulton v. L. S. & W. Ry. Co.*, L. R. 2 Q. B. 534; *Foster v. Essex Bank*, 17 Mass. 479; *Thames S. S. Co. v. H. Ry. Co.*, 24 Conn. 40; *Cooley on Torts*, 535, 536.

Even if a servant is engaged in the performance of his duty to his master, yet if he personally and wholly for a purpose of his own does an act not connected with the business of such master and not intended by him to further the objects of his employment, the master is not liable for an injury thereby occasioned. *C., B. & Q. R. R. Co. v. Epperson*, 26 Ill. App. 79; *C., B. & Q. R. R. Co. v. Casey*, 9 Ill. App. 632.

The company is not liable for the torts of a servant outside of the course of his employment, as when he is acting

with a view to effect an independent purpose of his own and not to execute the orders of the company; and he is not deemed in such act to be its servant, although employed generally, at the time, in its service. *Pierce on Railroads*, p. 279. A railroad company is not liable for assaults committed by its servants on a person who is not in any sense a passenger. *Wharton on Negligence*, p. 168; *Porter v. R. R.*, 41 Iowa, 358.

Where a servant quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests, his master will not be liable for such acts. *McManus v. Crickett*, 1 East, 106.

Where an agent or servant in a particular business goes outside of his employment or beyond his authority in discharging his duties, the master will not be liable for his acts. He is liable only for acts done within the scope of his authority. *Pritchard v. Keefer*, 53 Ill. 117; *Green v. Town of Woodbury*, 48 Vt. 5.

The tortious act must be actually within the scope of the servant's employment, and done in good faith in the interest of the master. This liability rests upon the reason that in contemplation of law the master is present and does the act voluntarily, though by the hand of the servant. Being so present, with the right to control the servant in respect to it—that is to forbid it, or to require it, and to direct and control as to the manner of doing it—the master should be responsible for it as done. If it be an act in respect to which he has no such right, as between him and the servant, and by virtue of their contract and relation, there would be no reason or justice in holding him responsible for it. *Vide I. C. R. R. Co. v. Ross*, 31 Ill. App. 177; also *The Springfield Engine & Threshing Co. v. Greene*, 25 Ill. App. 116, 117.

VERNOR & CARSON and JAMES A. WATTS, attorneys for appellee.

Where the servants of the company while in the dis-

charge of their duty pervert the appliances of the company to wanton and malicious purposes to the injury of others, the company is liable for such injuries. *Chicago, Burlington & Q. R. R. v. Dickson*, 63 Ill. 151.

Although a plaintiff may be guilty of negligence in permitting his animals to get on a railroad track, it is still the duty of the company to use ordinary skill and prudence to avoid doing them injury, and failing in this, it is liable. *Rockford, Rock Island R. R. v. Irish*, 72 Ill. 404; *Illinois Central v. Middlesworth*, 46 Ill. 494.

"If an engineer invites a person to ride with him on the engine, this act will not be within the scope of any duty he owes to his master, and if injury happens to such person as result of getting on, the master will not be liable; 'but if engineer invites a boy of seven years to get on the engine, in violation of his duty, and then invites the boy to get off while engine is in motion, and the latter is injured in getting off, the company will be liable.'" *Chicago, Milwaukee & St. P. R. R. Co. v. West*, 125 Ill. 320.

The rule is well recognized in this State that the master is liable not only for careless acts, but also for the willful and malicious acts of his servants, while acting within the scope of his duty and employment. *Chicago City Ry. Co. v. McMahon*, 103 Ill. 485.

Although a party may be guilty of negligence in putting himself in a place where he has no right to be, yet the other party, even in the performance of its lawful business, may not wantonly or willfully injure him, and if its servants, with a knowledge of the party's danger, fail to use ordinary care to avoid injuring him, the company will be liable for the injury. *Chicago West Div. Ry. v. Ryan*, 131 Ill. 474.

MR. JUSTICE BIGELOW delivered the opinion of the court.

It was not contended on the part of plaintiff below, nor is it contended by his counsel here, that the boy was not a trespasser, or that the railroad company owed him any duty more than it owed any other stranger, but the contention was, and is, that the acts of the brakeman in removing

the boy from the place where he was situated while the train was in motion and increasing in speed, were willful and malicious, and that the master is accountable for the consequences.

On the other hand, it is contended by counsel for appellant, first, that the evidence was insufficient to warrant the jury in finding, as they must have done, that the brakeman assaulted the boy, or did more than to order him not to get on the train; and, second, that if the brakeman did assault the boy, and forcibly remove him from the train while in motion, and in consequence thereof the boy was injured as claimed by him, still the railroad company is not liable for the injury, since the uncontradicted evidence shows that the instructions of the master to its servants were to stop the train and then put off persons who attempted to beat their way over the road without paying fare; and it also shows that the train was not stopped and that the injury was received while the train was in motion, and that therefore the brakeman is the only party liable for the injury which he willfully and maliciously did.

As to the first contention, the boy testified that the brakeman cursed him, and not only ordered him off the train, but forcibly pulled him off and at the same time threw and hit him with a rock, causing him to fall under the wheels of the car, which crushed his foot.

McNail, another witness, testified that he was standing on the sidewalk, waiting for the train to pass, and saw the boy on the rods under the car, and saw the brakeman come down the side of a car and run alongside of the train to where the boy was and commence cursing the boy, and that he had hold of the car with one hand and was grabbing with the other hand, and snatching at something under the car; that the brakeman stooped down and gathered up something and threw it, and was "hollering all of the time." He did not see the brakeman get hold of the boy, because the brakeman was between the boy and the witness and the train was running away from witness; that immediately after the brakeman picked up something and threw it at

the boy he climbed up the car, when witness seeing the boy was hurt, immediately went to him and found his foot crushed.

Van Smith, the conductor of the train, and a witness for appellant, testified that after the train stopped at Du Quoin, the brakeman said he "put a colored boy off at Ashley."

On the part of the defendant, the brakeman, Adams, testified he did not touch the boy or make any attempt to put him off, and did not throw anything at him.

The engineer of the train testified that he did not see the brakeman trying to get the boy off.

It is insisted by counsel for appellant that the boy made contradictory statements to Dr. Berry, his physician, as to the manner in which he met with the injury, but the following is the testimony of the witness as abstracted :

"When I first asked him how he came to get hurt, he told me that the brakeman hollered at him, 'You little black son of a bitch, get off there,' and that he jumped off. As he went to get back on, the brakeman threw and hit him with a rock and he fell and his foot went under the car; and at the first statement, made up at the office, before I commenced to give him chloroform, I told him not to tell me any lies at all about it; to tell me the truth, as I wanted to know something about where he belonged; and I asked him where he lived and about his parents, because I did not know whether he would come out of there alive, and I wanted to know what to do with him and where to send. I again asked for a statement and I told him to tell me the truth about it, and he said then the brakeman jerked him off the train and threw and hit him with a rock, and that made him fall and his foot went under the train. That is the best of my recollection now—what he said the second time. He made this statement just as he made it to-day, several days after the amputation."

To rebut this testimony of the doctor, the nurse of the plaintiff testified that the boy was out of his right mind for days after he was injured and did not know what he was saying on account of the severe pain he was suffering.

When all of the evidence is considered, it can not be said that the verdict of the jury should have been set aside because it was against the weight of it.

Upon the second point made by counsel for appellant, it can not be said that the authorities are entirely harmonious, but it would extend this opinion to too great a length to attempt a review of them here.

Some of the earlier decisions in New York and some of the other States, as well as in England, seem to hold that for the willful act of the servant, though done while engaged in the business of the master, the master is not responsible, but the trend of the later decisions is the other way.

In the case of *Mott v. Consumers' Ice Company*, 73 N. Y. 543, the court says: "The rule recognized in all the recent cases, and which does not materially conflict with any of the older decisions, although it may qualify some of the intimations and casual expressions or illustrations of the judges, is, that for the acts of the servant, within the general scope of his employment, while engaged in his master's business, and done with a view to the furtherance of that business and the master's interest, the master will be responsible whether the act be done negligently, wantonly or even willfully. In general terms, if the servant misconducts himself in the course of his employment, his acts are the acts of the master, who must answer for them." This we believe to be the true rule. *U. C. Ry. Co. v. McMahon*, 103 Ill. 485; *C. W. Div. Ry. Co. v. Ryan*, 131 Ill. 474; *I. C. R. R. Co. v. Ross*, 31 Ill. App. 170.

The primary requirement by the railroad company of the brakeman, was that the boy should be put off the train; but it is insisted that this requirement only carried with it "the employment of usual and lawful means" to do the act, and that when the servant went beyond the use of such means, the master was not acting through the servant, but the servant had dominated the master, and the servant alone became responsible for the consequences.

Such reasoning leads directly away from the rule announced, and would shield the master from liability for any

willful misconduct of the servant not done by the express command or in the immediate presence of the master.

The reason of the rule announced is that when an act is done by a servant that is required by the master, the mere quality of the doing of the act does not destroy the act itself, as coming from the master, and make it proceed, as to third persons, as coming from the servant alone. If it did, the master would seldom, if ever, be responsible for the acts of reckless servants. When a servant is doing an act falling within the scope of his employment, if he also wreaks his vengeance on the person or thing he is dealing with, it is absolutely impossible to determine where the sense of duty terminates and a thirst of vengeance commences, and hence the law holds the master responsible for the acts as a unit, if for no better reason than that the master is presumed to have possessed himself of the knowledge of the quality of a servant before employing him, and can not be held blameless in putting the servant in a position where, in doing his master's service, he also unnecessarily, intentionally and wickedly injures others.

We are unable to hold that the acts of the brakeman were not the acts of the master in whose service he was, or that the verdict of the jury was wrong, for the reason stated in appellant's second point contended for.

The instruction given for plaintiff, to which objection is made, is as follows :

1. "The court instructs you that if you believe from the evidence that the injury complained of was wantonly and willfully inflicted, as charged in the declaration, then the plaintiff will be entitled to recover, although you may believe from the evidence that plaintiff was guilty of some negligence."

The only objection urged against it is that it did not tell the jury that the servant who was the cause of the infliction of the injury must have been "acting in the line of his employment." On looking at the declaration we find it specific enough to obviate the objection, but we dislike to sanction the practice of sending a jury to examine a declaration to find out if the facts proven fit it, and hence we

hold the omission was cured by other instructions which fully covered the point, as will hereafter be seen.

Appellant's instruction directing the jury to find the defendant not guilty was properly refused. The remaining two refused instructions of appellant, with the reasons of the court for not giving them, are as follows :

"The court instructs you that there is no charge of negligence against defendant in the declaration, and plaintiff can not recover in this case unless the brakeman mentioned by the plaintiff was in the regular discharge of his duty when the accident happened."

(Refused because other instructions given to the same effect.)

"And even if you believe from the evidence that the plaintiff was wantonly and maliciously pulled from under the cars by the brakeman of the defendant, yet, unless you believe from the evidence that the brakeman was in the discharge of his regular duty and employment in pulling the plaintiff from under the car, you should find the defendant not guilty."

("Refused because another instruction given to the same effect.")

One of the instructions given for defendant is as follows :

"The plaintiff can not recover in this case unless you believe from the evidence that he was injured in consequence of the acts of the brakeman of the defendant, done in the line of his duty."

Another instruction given for defendant contained the same thing, hence the court committed no error in refusing to instruct the jury more than twice on the same point.

Finding no error in the record, the judgment is affirmed.

W. A. Blakney and C. D. Morgan v. Maud Mundy.

1. APPELLATE COURT PRACTICE—*Objections to Evidence Must be Made in the Trial Court.*—An objection to the introduction of evidence must be made in the trial court; it can not be made in this court for the first time.

Blakney v. Mundy.

Assumpsit, on a promissory note. Trial in the Circuit Court of Wabash County; the Hon. PRINCE A. PEARCE, Judge, presiding. Finding and judgment for plaintiff. Appeal by defendant. Heard in this court at the February term, 1898. Affirmed. Opinion filed August 31, 1898.

LEEDS & RAMSAY, attorneys for appellants.

MUNDY & ORGAN, attorneys for appellee.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

This is a suit in assumpsit on a promissory note, the declaration alleging that the plaintiff is the owner of the note. Plea by defendant Morgan that he was surety and gave notice to sue. Plea by both defendants of non-assumpsit. Trial by the court and judgment for the amount of the note.

The note is as follows :

\$100.

Twelve months after date, for value received, I promise to pay Lucinda Walser, or order, \$100 with eight per cent interest from date until paid. If this note is not paid at maturity a reasonable attorney's fee shall be due; and if this note is put into judgment, shall be included therein.

Witness my hand this 15th day of October, 1889.

W. A. BLAKNEY.

C. D. MORGAN.

Indorsed, \$8 interest paid on note.

The abstract in the case makes no reference to any judgment. An examination of the record, however, shows that a judgment was rendered, and while under the rules of this court we might affirm the judgment for lack of a complete abstract, we have considered the case upon the points presented by appellant.

It is urged that the plea of suretyship and notice by defendant Morgan is proved. But two witnesses testified as to notice, and their testimony is directly conflicting. It is true that the witness denying the alleged notice is the plaintiff, and the witness testifying to notice is apparently a disinterested witness.

But the court saw and heard them, and was for that reason better prepared to pass upon their credibility than we are.

It is also insisted that the court erred in refusing the first proposition of law asked by appellant; that the finding of the court is inconsistent with the proposition of law held by the court.

The refused proposition is as follows :

No. 1. "The plaintiff can not recover in her own name upon the promissory note, made payable to her mother, and in evidence in this suit."

The proposition held to be law is :

No. 2. "An heir can not maintain an action at law on a promissory note made payable to the ancestor in the absence of an assignment of the same; or in the absence of proof of due administration, payment of all debts against the estate of an ancestor, and a distribution of the proceeds; or that the plaintiff is the only heir."

Both propositions of law, as the case stood, might with propriety have been refused, as not pertinent to the case. The declaration, after alleging the making and delivery of the note to Lucinda Walser in the usual form, further alleges that the plaintiff, Maud Mundy, is now the owner of the note, and that the defendants, the makers of the note, promised to pay her the sum of money according to the tenor and effect of said note. To this defendants pleaded non-assumpsit, and made no objection to the introduction of the note in evidence.

Not having objected to its introduction in evidence, the question of the right of appellee to sue in her own name was not raised in the trial of the case, and can not therefore be raised in this court. *Smith v. Moore*, 3 Scam. 462.

For all we know, if it had been raised during the trial, appellee might have introduced testimony showing her right to sue under the conditions stated in proposition of law No. 2, above cited.

The only evidence introduced by appellee in the first instance was the note sued on.

Missouri & Illinois Coal Co. v. Schwalb.

The only evidence introduced by defendants was the witness Jacob Gupton, who testified that Morgan gave Lucinda Walser, the mother of Maud Mundy, the plaintiff, written notice as surety, to sue the note. Maud Mundy testified that she was present at the time mentioned and that no written notice was given.

As the case stands, the judgment must be and is affirmed.

Missouri and Illinois Coal Co. v. John Schwalb et al. 77 598
e100 488

1. MINES AND MINING—*Actions Under Section 14 of Chapter 93, R. S., Mines.*—In order to maintain an action in case of loss of life occasioned by a violation of Section 14 of Chapter 93, R. S., entitled "Mines" (Hurd's Statutes, 1898, 1091), the burden is upon the plaintiff to show that the violation was willful.

Trespass on the Case.—Death from negligent act. Trial in the Circuit Court of St. Clair County; the Hon. ALONZO S. WILDERMAN, Judge, presiding. Verdict and judgment for plaintiffs. Appeal by defendant. Heard in this court at the February term, 1898. Reversed and remanded. Opinion filed March 10, 1898.

WISE & McNULTY, attorneys for appellant.

WEBB & WEBB, attorneys for appellees.

PER CURIAM.

Adolph Schwalb was killed in the mine of appellant on the 11th of April, 1896, about half past eleven in the forenoon, by the falling of a "pot" or "clod" of dirt from twelve to fifteen feet in diameter, thin at the edges and eight inches thick in the middle, from the roof of the room in which he had been working. At about eleven o'clock of the forenoon of the above date he was called to the foot of the shaft, where, for some reason, he was discharged. He returned to the room for his tools, and while getting them, the "pot" or "clod" fell, causing his death. This action

is brought by the father, mother and four brothers of the deceased. It was tried upon the second amended declaration, to which the general issue was pleaded. The part of the declaration material to be considered in this case is in substance as follows:

Plaintiffs aver that it was the duty of defendant to have had its said mine examined every morning by a duly authorized agent to determine whether there were any dangerous accumulations of gas, or lack of proper ventilation, or obstructions to roadways, or any clod, dirt, rock, or any other overhanging material likely to become detached from the roof of said mine, and fall upon and injure defendant's employes, or any other dangerous conditions, and to allow no person to enter the mine until such agent shall report all conditions safe for beginning work, and to have required such examiner or agent to make a record of such daily examinations in a book kept for that purpose, such book to be kept where it could be inspected by the men employed in and about the mine.

Plaintiffs further aver that defendant, contrary to the statute, willfully, wrongfully and negligently failed and omitted to have its said mine examined as aforesaid, and willfully, wrongfully and negligently allowed and permitted its employes to enter said mine without first having had said mine examined as aforesaid, and failed to give notice of such examination in a book to be kept for that purpose as aforesaid.

Plaintiffs further aver that on the 11th day of April one Adolph Schwalb was in the employ of defendant, and was engaged in and about his duties in said mine, and while so engaged a large quantity of rock, dirt and clod became detached and loose from the roof of said mine and fell upon him and so crushed his body that he immediately died.

By means of which said willful, wrongful and negligent failure and omission of defendant to have his mine examined as aforesaid, and allowing its employes to enter said mine without first having the mine examined as aforesaid, and the failure to keep a record of such examination in a book

to be prepared and kept for that purpose, the said Adolph Schwalb lost his life.

The second count of the declaration as to the duty of appellant to make an examination and to keep a record in a book, etc., and that it was not made, and that in consequence thereof deceased came to his death, is the same in substance as the first count.

The declaration is based upon that part of Section 4 of Chapter 93, Starr & Curtis Stat., which is as follows:

"All mines in which men are employed shall be examined every morning by a duly authorized agent of the proprietor, to determine whether there are any dangerous accumulations of gas, or lack of proper ventilation, or obstruction to roadways or any other dangerous conditions, and no person shall be allowed to enter the mine until such examiner shall have reported all the conditions safe for beginning work. Such examiner shall make a daily record of the condition of the mine in a book kept for that purpose, which shall be accessible at all times for examination by the men employed in and about the mine and by the inspector."

Section 14 of said act provides:

"For any injury to person or property occasioned by any willful violations of this act, or willful failure to comply with any of its provisions, a right of action shall accrue to the party injured for any direct damages sustained thereby; and in case of loss of life by such willful violation or willful failure as aforesaid, a right of action shall accrue," etc.

No examination of the mine was made in the morning before the miners entered, and no record made of its condition. The important question then to be answered is, did Adolph Schwalb lose his life through a willful failure to make an examination in the morning as required by the statute. If he did, appellant is liable under the declaration. If he did not lose his life through such failure, appellant is not liable. This leads to the consideration of two propositions: First, if an examination made in the morning before the miners entered would not have disclosed the dangerous condition of the room, then Adolph Schwalb did not lose his life through a failure to make such examination.

Second, if an examination of the character intended by the statute was made at half past eight in the morning, two hours before Schwalb was killed, and did not disclose the "clod" or "pot" which fell and killed him, then appellant is not liable under this declaration; for it is evident that if the danger of a falling "clod" or "pot" was not apparent at half past eight it would not have been apparent at an earlier hour. This action is not brought to recover a penalty for violating a law, but is brought to recover damages alleged to have been caused by a violation of the law. The time of the examination then, so far as this case is concerned, is immaterial if made before the accident occurred.

Was there an examination by the agent of appellant before the accident?

William Conrad testifies in substance: "I am thirty years old; am mine manager of the St. Clair (appellant's) mine. I inspected the room that Adolph Schwalb was working in when killed, about 8:30 in the morning. I inspected it to comply with the law. When I inspected it I had my light. There were two others in the room when I inspected it and they had lights. (These two were the deceased and his brother-in-law, Gautner.) I held my light in my hand and looked around. I discovered a shell or clod. I ordered Gautner to pull it down. It was the duty of the man working in that room to take care of the roof. A man can detect a difference between a solid roof and one that is not solid. It was a soft little shell of a clod when he took it down. I did not see a thing of this 'pot' that fell. If it was loose, it would have sounded. A 'pot' of this kind will not get loose three hours before it falls. I regarded the room as in proper shape when I left it that day. It was my duty as pit-boss to examine the mine, and I examined it every day but after the men went to work. There would be no difference in the sound of the rock roof and the 'clod' roof, if they were both solid. I was inspector that day. I examined it about 8:30; they had been at work in this room about an hour and a half. I examined it simply with my light with the aid of the other two lights. Had been exam-

iner for three weeks. I returned to the room about 11:30, right after the accident. At 8:30 I could not have detected the looseness of that 'pot' if I had sounded it. If I could it would have fallen sooner."

This testimony of Conrad as to what he did, is not only not contradicted, but it is corroborated by Gautner, a witness for appellees and a brother-in-law of the deceased.

He testifies :

"The pit boss, Wm. Conrad, came into the room about half past eight. He had a light in his hand, and said to me, 'there is a piece of clod hanging loose; pull it down before it blows your light out for you.' It was about the size of a shovel. He did nothing else. Adolph was there when Conrad was there. Mr. Conrad, after he held his light around, and walked clear up to the face, called my attention to the fact there was some 'clod' loose. I walked around and could not see any more hanging. I pulled that down and kept on working. I threw my pick up and didn't hear nothing. I threw it up against the roof; it was not loose when I threw it. I walked through the middle of it, clear through to the face, and would throw my pick up every once in awhile. I couldn't tell anything from the sound, because I did not understand that. I was walking around and I picked ahead of me before I walked further. Conrad did not sound the roof but he looked over it with his light."

These are the only witnesses testifying as to the examination. The statute does not provide how or to what extent it must be made. The right of recovery in the declaration and in the statute is based upon a "willful" failure, or "a willful violation" of the law requiring an examination. Can it be said, in view of the above testimony, that there was a willful failure to examine the roof of the room in question? Clearly not. The testimony of Conrad, and it is not contradicted, shows that he did examine the roof, "to comply with the law," and that in his opinion the sounding of the roof would not have disclosed the clod. Gautner examined the roof both by his light and by sounding, and did not discover it.

The jury then was not warranted by the evidence in answering "No," to the special interrogatory: "Was the mine inspected by the pit boss about eight o'clock the morning deceased was killed?"

In view of what we have said, and of the evidence as to the examination at half past eight, we think the following instruction given for appellees was misleading:

10. "If you believe from the evidence that the defendant, by its inspector, omitted to make the examination of the mine in the morning before the miners, including the deceased, were permitted to enter the mine on the day the accident occurred, by which the defendant lost his life, then, in determining whether such omission was willful on the part of the defendant, you may consider whether the defendant continuously omitted such examination for a considerable period of time, immediately before such accident, if you believe from the evidence it did so omit such examination; but you are not to understand the court as saying to you that such continuous omission would, of itself, make the omission on the day of the accident willful, but simply that you may consider that evidence in connection with all the other evidence in the case. And the court further instructs you that you must not consider any such evidence of previous omissions as proving or tending to prove that the defendant or its examiner omitted to make such examination on the morning of the day on which the accident occurred."

In view of the evidence, this instruction gives undue importance to an omission to make an examination in the morning before the miners entered. A failure to make such an examination might have been willful, and yet if a subsequent examination was made in good faith, before the accident, and the cause of the accident was not discovered, then a willful failure to make it at an earlier hour, when the cause would have been less likely to be discovered, is not a ground of recovery under the declaration.

We think, too, the following instruction asked by appellant states the law correctly and should have been given:

Vick v. Clark.

"The court instructs you that in this case the plaintiff must prove all the material allegations of his declaration, and this being a suit for an alleged violation of a statute, the plaintiff must prove before he can recover, first, that the defendant itself or through its proper representative willfully and wrongfully violated the act in question in the manner alleged in the plaintiff's declaration; second, the plaintiff must prove by the greater weight of evidence that this willful violation of this act, as alleged in the declaration (if you believe there was a violation), was the principal and substantial cause of the injury. And you are instructed that if you should believe from the evidence that an examination of the mine was not made the day the deceased was injured before he and other employes entered said mine, but yet, if you further believe from the evidence that an examination of the mine was made by the defendant through its manager some hours before the deceased was injured, and said mine was apparently safe from danger of falling clods, rock, etc., and that you further believe from the evidence that even though the mine had been inspected early in the morning before deceased went to work, this accident would have happened, then the court instructs you that under the evidence, the accident was not caused principally and substantially by a failure to inspect the mine as required by law."

For the reasons above stated judgment is reversed and case remanded.

S. S. Vick v. James H. Clark, Receiver.

1. **CONTRACTS**—*Certificate in Benefit Societies is Unilateral*.—The contract of insurance existing between the Masonic Benevolent Association of Central Illinois and its members is purely unilateral and no recovery can be had thereunder by such association or its receiver against members thereof.

Assumpsit, by a benefit association, on a certificate, etc. Trial in the Circuit Court of Williamson County; the Hon. OLIVER A. HARKER,

VOL. 77.]

Vick v. Clark.

Judge, presiding. Finding and judgment for plaintiff. Appeal by defendant. Heard in this court at the August term, 1897. Reversed and remanded. Opinion filed August 31, 1898.

CLEMMENS & WARDER, attorneys for appellant.

ANDREWS & VAUSE and JAMES F. HUGHES, attorneys for appellee.

PER CURIAM.

This was a suit in assumpsit by appellee against appellant, commenced and prosecuted to judgment in the Circuit Court of Williamson County.

The declaration sets out in substance that the Masonic Benevolent Association of Central Illinois was duly incorporated on the 29th day of May, 1874, in pursuance of an act of the General Assembly, approved April 18, 1872; that it did business until April 17, 1894, when, by an order of the Coles County Circuit Court in a proceeding at the suit of the attorney-general of the State of Illinois against said association, the corporation was dissolved and James H. Clark appointed receiver; that said Circuit Court ordered the receiver to make an assessment on the members of the association to pay its debts and obligations and to enforce payment of such assessments, if not paid within sixty days; that the liabilities of said association for death losses due on beneficiary certificates of deceased members aggregated \$134,000; that the receiver duly qualified, and in pursuance of the order of said Circuit Court, did on July 2, 1894, make an assessment upon the members to pay said liabilities; that appellant, at the time of the dissolution of the association, was a member in good standing and held a beneficiary certificate for \$4,000; that the aggregate sum of the assessments against appellant is \$159.90; and that appellant neglects and refuses to pay, etc.

To the declaration a plea of non-assumpsit and the following stipulation—"It is hereby stipulated that under the plea of general issue, any and all evidence admissible under any conceivable good plea, shall be admissible and introduced, if offered by defendant at the trial"—were filed.

Easterday v. Cutting.

Jury was waived and a trial had by the court by agreement. The court found the issues for appellee, and assessed damages against appellant at the sum of \$159.90, and rendered judgment on the finding.

To reverse this judgment appellant brings the case to this court.

Many errors are assigned and urged, but the one controlling question is as to the character of appellant's contract with the Masonic Benevolent Association of Central Illinois.

The Supreme Court of this State in *Lewis L. Lehman v. James H. Clark*, Receiver, opinion filed June 23, 1898, has fully discussed and determined the character of such contract. The conclusion there reached is that this contract (for the contract in that case is precisely the same as the contract in this), is purely unilateral; that no right of recovery could be had thereunder by the association against the member, and therefore no recovery can be had by a receiver of the association.

The judgment of the Circuit Court is reversed.

E. P. Easterday and A. H. Perrine, Jr., v. Sidney A. Cutting.

1. *APPEALS—Dismissal for Non-Compliance with Rule to Furnish an Abstract.*—In all cases the party bringing a cause into this court must furnish a complete abstract or abridgment of the record, referring to appropriate pages of the record by numerals on the margin.

Replevin.—Trial in the Circuit Court of Pulaski County on appeal from a justice of the peace; the Hon. JOSEPH P. ROBERTS, Judge, presiding. Judgment and verdict for defendant. Appeal by plaintiff. Heard in this court at the February term, 1898. Dismissed for non-compliance with the rule. Opinion filed August 31, 1898.

L. M. BRADLEY, attorney for appellants.

H. G. CARTER, attorney for appellee.

PER CURIAM.

Appellants fail to comply with the rules of this court requiring a statement of the case, and an abstract of record.

Rule 23 provides that "the brief of appellant or plaintiff in error shall contain in the beginning a concise statement of the case, including, in a general way, the form of action, the substance of the pleadings without details, the substance of the evidence, omitting names of witnesses and all other details, the judgment and rulings of the trial court complained of. Such statement will be deemed correct except in so far as the opposite party may indicate by a separate statement of his own to be contained in his brief."

A statement of the character required by this rule is of great convenience to an Appellate Court, by giving a bird's-eye view of the contention of appellant and the matter upon which he relies. The statement furnished falls far short of the requirements of the rule. It amounts in substance only to this, that appellee, before a justice of the peace, replevied a sewing machine, claiming ownership, from appellant Easterday, holding it as agent of the Singer Manufacturing Company by virtue of a contract found on page 39 of the record; that appellant recovered judgment before the justice, and appellee appealed to the Circuit Court, where appellee recovered judgment, and appellant then appealed to this court.

Rule 23 provides that "in all cases the party bringing a cause into this court shall furnish a complete abstract or abridgment of the record thereto, referring to appropriate pages of the record by numerals on the margin."

For the first twelve pages of the record the abstract furnished is simply an index, abstracting nothing. The evidence for plaintiff and for defendant is abstracted, but without marginal references to the record.

The amount involved in the controversy is small, the issue being as to the right of possession by appellant of a sewing machine, for non-payment of a part of the purchase money,

when \$30 had been already paid, and where a dispute exists between the agent and the purchaser as to what the contract really is.

We think it a proper case for the enforcement of the rules of court, and for non-compliance with these, as above stated, the judgment of the Circuit Court is affirmed.

Indiana and Illinois Southern Ry. Co. v. G. S. Wilson & Son.

1. *DEPOSITIONS—Names of Parties to be Indorsed on the Envelope, etc.*—The indorsement on an envelope containing depositions returned to the clerk of the court as taken in a suit pending in which the "Indiana and Illinois Southern Railway Company" was defendant, was in the name of the "Indiana & Illinois So. Ry." *Held*, a sufficient compliance with the provisions of the statute requiring the names of parties litigant to be indorsed on the envelope in which they are delivered to the clerk of the court.

2. *SAME—Construction of the Statute—Requiring Names to be Indorsed, etc.*—The statute requiring the indorsement of the names of parties litigant on the depositions when sealed up is merely directory, and when no injury or surprise results, depositions will not be suppressed because of a failure of the officer taking the depositions to so indorse the names.

3. *SAME—Failure of Certificate to Show Adjournments.*—The failure of the certificate to show an adjournment is a mere irregularity, which, in absence of any evidence tending to show that one of the parties was injured or surprised thereby, is not sufficient to warrant the suppression of a deposition.

4. *INSTRUCTIONS—When Error in Refusing is Not Reversible.*—Where a party asked the court to give thirty-six separate instructions, many of them of unusual length, and the court refused some of them, among which was one that ought to have been given, but with which exception everything the party was entitled to have was embraced in those given, *held*, that the error in refusing the instruction was not reversible error.

5. *SAME—Duty of the Trial Judge.*—No judge can be expected, within the time generally at his disposal, to properly examine and pass on so many long instructions, repeating the same things over and over again, in complicated and involved phraseology, and not make some mistakes.

6. *SAME—Error in Refusing, When Not Reversible.*—Judgment will

77	603
82	139
77	603
88	136
77	603
95	*132
77	603
199	*169
77	603
196	511
77	603
102	*198
77	603
108	*127
77	603
118	*292

not be reversed because of an error by the trial court in the giving or refusing instructions, where it is apparent upon the whole record that substantial justice has been done.

7. *SAME—Error in, When the Evidence Sustains the Verdict.*—When the evidence clearly sustains a verdict, the Appellate Court never reverses because of error in instructions.

Assumpsit, to recover damages sustained in transportation of wheat by a common carrier. Trial in the County Court of Crawford County: the Hon. JOHN C. EAGLETON, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the February term, 1898. Affirmed. Opinion filed August 31, 1898.

PARKER & CROWLEY, attorneys for appellant.

BRADBURY & MAC HATTON and CALLAHAN, JONES & LOWE, attorneys for appellees.

MR. PRESIDING JUSTICE CREIGHTON delivered the opinion of the court.

This was a suit in the County Court of Crawford County, by appellees against appellant, to recover damages claimed to have been sustained by appellees in the transportation of wheat shipped under a contract with appellant as common carrier. Appellees shipped sixty-two carloads of wheat from Palestine, Illinois, to Detroit, Michigan, at a rate of twelve cents per hundred pounds, and claim that they were overcharged; that a part of the wheat, before it reached its destination, was caused by appellant to be transferred into lime cars, whereby it was mixed with lime and thereby damaged, and that before the wheat reached its destination appellant caused it to be transferred into other cars than those in which appellees loaded it, and that in the act and manner of transferring it a part of it was wasted and lost.

Appellant denies that there is any overcharge, denies that any of the wheat was mixed with lime, denies that any of the wheat was wasted or lost, denies that appellees have sustained any damage, and pleads that there had been a settlement of the supposed liability and an adjustment of all matters between the parties.

Trial was by jury. Verdict and judgment in favor of appellees for \$375.

Appellant urges as grounds for reversal, that the court erred in overruling appellant's motion to suppress depositions, in admitting improper evidence on behalf of appellees, and in refusing to admit proper evidence offered by appellant, in giving improper instructions asked by appellees and refusing proper instructions asked by appellant, and that the verdict is not supported by the evidence.

It is contended by appellant that the depositions should have been suppressed, because the officer who took them failed to properly comply with the requirements of the statute concerning the indorsement of the names of the parties litigant on the envelope in which he mailed them to the clerk.

The statute provides that when depositions are taken they shall be "sealed up and directed to the court in which the action shall be pending, with the names of the parties litigant indorsed thereon."

The name of one of the parties litigant is indicated in this record in many different ways. The summons, declaration and all the original pleadings, except a demurrer filed by appellant, seem to have been lost.

In appellant's demurrer, the name of appellant appears as follows: "Indiana, Illinois Southern Railway." In the order sustaining appellant's demurrer, the name of appellant appears: "The I. & I. S. R. R. Co." In appellees' account filed, the name of appellant appears: "The Indiana, Illinois and Southern Railway Company." In a stipulation concerning opening depositions, the name of appellant appears, "The Indiana & Illinois Southern Railroad Co." In a stipulation concerning lost papers, the name of appellant appears, "The Indiana & Illinois Southern Railway Company." And on the back and front page of appellant's abstract, the name of appellant appears, "Indiana and Illinois Southern Railway Company." On the envelope containing the depositions, the name as indorsed by the officer who took the depositions, appears, "Indiana & Illinois So. Ry."

Appellant contends that this does not comply with the requirement of the statute, and for that reason the depositions should have been suppressed.

In *Cole v. Choteau et al.*, 18 Ill. 439, it is held that the statute requiring the indorsement of the names of parties litigant on the depositions when sealed up, is merely directory, and when no injury or surprise results, depositions will not be suppressed, because of a failure of the officer taking the depositions to so indorse the names.

In *Forsyth et al. v. Baxter et al.*, 2 Scam. 12, it is held that an indorsement on the depositions, sufficient to indicate in what case the proceeding to take depositions was had, complies with the statute. Appellant also contends that the depositions ought to have been suppressed, because the date of the *jurat* at the foot of the depositions appears to be of a date later than the date fixed for taking the depositions and on which the witnesses first appeared, and were sworn and examined.

The parties appeared on the day named, appellant being represented by its attorneys. The witnesses previous to their examination were respectively sworn as the law requires, and duly examined and cross-examined. This was on the second day of June, and all fully appears from the officer's certificate, and from the face of the depositions. The *jurats* at the foot of the respective depositions bear dates, some of them June 9th, and some June 12th.

The statute provides that the officer shall cause the witnesses to be sworn previous to their examination, and "shall cause such interrogatories, together with the answers of the witnesses thereto, to be reduced to writing in the order in which they shall be proposed and answered, and signed by such witnesses; after which it shall be the duty of the person taking such deposition to annex at the foot thereof a certificate, subscribed by himself, stating that it was sworn to and signed by deponent, and the time and place when and where the same was taken." All this was literally done. The officer caused the witnesses to be duly sworn before the examination began; he caused the interrogatories

and answers thereto to be reduced to writing and signed by the witnesses, after which he annexed his certificate subscribed by himself, etc.

Appellant contends that if it could not all be reduced to long hand or typewriting on the same day of the examination, that the officer ought to have adjourned to some future day. That would have been the more regular course. But appellant's attorneys were present, and as we have no affidavit or other evidence to the contrary, the presumption is they consented to the course that was pursued. However this may be, the failure of the certificate to show an adjournment is a mere irregularity, which, in the absence of any evidence tending to show that one of the parties was injured or surprised thereby, is not sufficient to warrant the suppression of the depositions.

Appellant contends that the court admitted improper evidence on behalf of appellee, and refused to admit proper evidence offered by appellant. We have gone through this voluminous record fully and as carefully as we could, and are of opinion the court committed no material error in the admission or rejection of evidence.

Appellant insists that there is no evidence to support appellees' instructions concerning their claim for overcharge. Appellant agreed to transport appellees' wheat at a specified price, and caused to be collected from them a greater sum than the agreed price would amount to; this excess would be an overcharge, unless it be justified. Appellant attempts to justify it by claiming that the excess was properly expended in elevating and cleaning the wheat. Evidence was introduced *pro* and *con* upon these issues. We are of opinion that the claim for overcharge was properly submitted to the jury.

Appellant complains that the court improperly refused to give certain instructions asked, to be given on its behalf. Appellant presented to the court and asked the court to give thirty-six separate instructions, many of them of unusual length. They cover thirteen closely printed large pages in the abstract. The court refused some of

them; among the refused ones is one that ought to have been given. With that exception everything that appellant was entitled to have is embraced in those given. No judge can be expected within the time at his disposal on such occasions, to properly examine and pass on so many long instructions, repeating the same things over and over again in complicated and involved phraseology, and not make some mistakes. No such number of instructions, nor the third of that number, are ever necessary to a proper statement of the law in such case as this. To present such number of instructions in a case as simple as this one, is to invite error and become a party to it.

The court should have given one of appellants' instructions on the question of settlement. But a judgment will not be reversed because of an error by the trial court in the giving or refusing of instructions, where it is apparent upon the whole record that substantial justice has been done.

In *Young v. McConnell*, 110 Ill. 84, the court says: "When the evidence clearly sustains a verdict, this court never reverses because of error in instructions, and the Appellate Court is doubtless governed by the same rule, as it is required by law."

The Appellate Court is governed by the same rule. In *Conklin v. Burdick*, 6 Ill. App. 153, it is said: "There can be no question that several erroneous instructions were given to the jury on the trial of this case. We think, however, upon a careful examination of all the evidence in the record, substantial justice has been done by the verdict of the jury." In *St. L. V. & T. H. R. R. Co. v. Morgan*, 12 Ill. App. on page 258, the court says: "We do not regard some of the instructions as accurate, but it seems to us that substantial justice has been done, and that a new trial would result in the same judgment." We cite as supporting this rule, *Dishon et al. v. Schorr*, 19 Ill. 59; *Boynton v. Holmes*, 38 Ill. 59; *Parker v. Fisher et al.*, 39 Ill. 164; *Watson v. Woolverton*, 41 Ill. 241; *Pahlman v. King*, Admx., 49 Ill. 266; *C. & A. R. R. Co. v. Sullivan*, Admx., 63 Ill. 294; *Beseler v. Stephani*, 71 Ill. 400; *Hewitt v. Jones*, 72 Ill. 218.

It is contended by appellant that the verdict is against the evidence.

There is, in our opinion, ample testimony tending to support the verdict. While upon some items it is conflicting, yet upon the whole, to the extent of the amount found by the jury, it strongly preponderates in favor of appellees. We think upon a careful examination of the whole record that substantial justice has been done by the verdict of the jury and judgment of the trial court.

The judgment of the trial court is affirmed.

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179 108

George Blackman and The Helvetia Milk Condensing Co. v. Metropolitan Dairy Co. et al.

1. **VOLUNTARY ASSIGNMENTS—At Common Law.**—By the common law a failing debtor had the right, in all cases, to pay, provide for, secure and prefer one or more creditors to the exclusion of any and all others. These rights still exist in full force, in this State, except in so far as they are restricted by the assignment act of 1877.

2. **SAME—Preferences—Under the Laws of Illinois.**—A failing debtor has both the legal and equitable right to pay one or more of his creditors in full to the exclusion of all others. He has the right to sell and turn over, in payment, all his property to one or more of his creditors, or incur it by mortgage or deed of trust to secure one or more of his creditors. He may pledge all his property or create liens on it, in any form, to secure one or more of his creditors, or confess judgments for as much as all his property is worth, to one or more of his creditors, to secure debts *bona fide* due, and in short he may make any and all dispositions of all of his property to pay or secure one or any number of his creditors, to the exclusion of all others, except that he may not in a general assignment for the benefit of his creditors, provide for the payment of one debt or liability in preference to another.

3. **SAME—Defined.**—A voluntary assignment is an instrument in writing executed by a failing debtor by which he assigns or transfers to some third person, as assignee, the whole or the bulk of his property, to be by such trustee distributed among the assignors' creditors in satisfaction of their demands.

4. **SAME—Requisites of.**—In order to create an assignment within the meaning of the statute, the property must be conveyed to an assignee, who is to sell it absolutely and not on a contingency, and distribute the

proceeds among creditors. The conveyance or assignment must pass the legal and equitable title with no right of redemption in the debtor.

5. *SAME—What is Not.*—A conveyance direct to several creditors whose debts it secures, as well as to a trustee named, providing that the trustee is not to sell it absolutely, but only on a contingency, does not constitute an assignment under the statute forbidding preferences. Such an instrument is in effect a mortgage.

6. *SAME—Constructive Assignments.*—Under the act of 1877, there can be no such thing as a constructive assignment for the benefit of creditors.

Mortgage Foreclosure.—Appeal from the Circuit Court of Madison County; the Hon. MARTIN W. SCHAEFFER, Judge, presiding. Heard in this court at the February term, 1898. Reversed and remanded with directions. Opinion filed September 9, 1898.

JOHN G. IRWIN and J. P. STREUBER, attorneys for appellants.

HADLEY & BURTON, attorneys for appellees.

MR. PRESIDING JUSTICE CREIGHTON delivered the opinion of the court.

On the 7th day of May, 1897, Metropolitan Dairy Company, of the city of St. Louis, Mo., duly executed and delivered to George Blackman, Third National Bank of St. Louis and Helvetia Milk Condensing Company, a conveyance of certain merchandise, machinery, fixtures, appliances and outstanding accounts, all in the State of Missouri, and certain real estate in Madison county, Ill., to secure payment to Third National Bank of St. Louis, indebtedness evidenced by two promissory notes, and to secure payment to Helvetia Milk Condensing Company, indebtedness evidenced by one promissory note and two open accounts. The instrument provides that if the grantor shall pay off and discharge the debts therein mentioned with the interest thereon as the same matures, then the conveyance to be void, otherwise to remain in full force and effect, and that Blackman, one of the grantees, shall take immediate possession of all the property conveyed, and proceed to sell the same in bulk or at retail, at public or private sale, as he may deem for the

best interest, and until sold may rent or lease such property; that he shall collect the accounts and apply the proceeds of all moneys received by him as follows:

“First, he shall pay the expenses of the trust, including reasonable compensation for himself. Second, he shall pay all claims which may have preference under the statutes of Missouri. Third, he shall pay and fully satisfy the said debts owing to said Third National Bank as they mature and become payable, or so much thereof as shall not have been paid by the party of the first part. Fourth, he shall pay and satisfy the said note owing to said Helvetia Milk Condensing Company, and next the open account owing said company, as the same mature and is demanded, or so much thereof as shall not have been paid by the party of the first part. If any surplus remains in the hands of the trustee after the above payments are made, the same shall be paid to the party of the first part, its legal representatives or assigns.”

The conveyance was drawn and executed in duplicate. Both were originals, and were duly recorded in Missouri May 7, 1897, and in Illinois May 6, 1897. The property conveyed was all that was owned by the grantor at that time, and the grantor was heavily indebted. The extent of its indebtedness and the number and location of its creditors are not fully disclosed. Of the two sought to be secured by the conveyance, one—Third National Bank of St. Louis—is a citizen of Missouri, and the other—Helvetia Milk Condensing Company—is a citizen of Illinois.

In pursuance of the terms of the conveyance Blackman took possession of the property, converted all of it, except the real estate in Illinois, into money, realizing enough to pay all that the instrument provided for except Helvetia Milk Condensing Company.

After the recording of the conveyance certain creditors of the grantor, residing in Illinois, commenced attachment proceedings against the grantor, and levied on the real estate, but appellants were not made parties.

All the property having been converted into money,

except the Illinois real estate, and all the debts secured by the conveyance having been satisfied, except the debt due to Helvetia Milk Condensing Company, appellants—treating said instrument, so far as it related to the real estate in Illinois, as a trust deed or other conveyance in the nature of a mortgage containing power of sale, and as falling within the provisions of section twenty-two of chapter ninety-five, Revised Statutes of Illinois, which requires such instruments to be foreclosed, same as mortgages containing no power of sale—on the 18th day of August, 1897, filed their bill in the Madison Circuit Court to foreclose said instrument for the satisfaction of the debts secured to Helvetia Milk Condensing Company, and made the grantor and all the grantor's attaching creditors parties defendant.

The attaching creditors answered the bill, setting up their attachments, charging certain frauds not supported by the evidence and therefore not material here to note, and averring that the conveyance is an assignment for the benefit of creditors, under the laws of the State of Illinois; that the provisions in said instrument securing Third National Bank and Helvetia Milk Condensing Company, constitute a preference of these creditors, and are therefore void and of no effect.

Upon final hearing the Circuit Court held and decreed the conveyance to be, in effect, a deed of assignment for benefit of creditors, appointed a receiver, ordered sale of the real estate, and that all the creditors of the grantor who resided in the State of Illinois at the date of the making of the conveyance shall share equally and without preference.

Appellants bring the case to this court, but both appellants and all the appellees, except the grantor, assign errors.

Appellants contend that the instrument is a mortgage and not an assignment, nor in effect an assignment, and that the court erred in not granting a decree of foreclosure.

Appellees contend that the instrument is, in effect, an assignment, but that it is a foreign assignment, contrary to the laws and public policy of this State, and void as to domestic or other creditors attaching property in this State,

and that the court erred in decreeing that all Illinois creditors should share equally and without preference, and in not preferring the attaching creditors to all others.

This brings us to a consideration of the instrument and the effect of the conveyance. It is not an assignment under the laws of Missouri, and has not been and is not being administered there as such. There is no contest here between domestic and foreign creditors. The appellant creditor and all the appellee creditors are citizens of Illinois. This is a contest among domestic creditors for priority of lien, but all this does not relieve us from the duty of determining whether the conveyance in question is, in effect, such an assignment for the benefit of creditors as falls under the provisions of our statute. If so, then under Section 13 of Chapter 10a, Hurd's Statutes, 1895, the provisions in the instrument securing Helvetia Milk Condensing Company are provisions for the payment of its debt in preference to that of the attaching and other creditors, and therefore void.

In determining the character and effect of the conveyance as to the Illinois real estate, it must be tested and governed by the laws of Illinois. By the common law a failing debtor had the right, in all cases, to pay, provide for, secure and prefer one or more creditors to the exclusion of any and all others. These rights still exist in full force in this State, except in so far as they are restricted by the assignment act of 1877.

As the law now stands in this State a failing debtor has both the legal and equitable right to pay one or more of his creditors in full, to the exclusion of all others; he has the right to sell and turn over in payment all his property to one or more of his creditors, to the exclusion of all others; he may incumber all his property, by mortgage or deed of trust, to secure one or more of his creditors, to the exclusion of all others; he may pledge all his property or create liens on it, in any form, to secure one or more of his creditors, to the exclusion of all others; he may confess judgments, for as much as all his property is worth, to one or more of his

creditors, to secure debts *bona fide* due, to the exclusion of all others; and in short, he may make any and all dispositions of all of his property to pay or secure one or any number of his creditors, to the exclusion of all others, except that he may not, in a general assignment for the benefit of his creditors, "provide for the payment of one debt or liability in preference to another." Walker et al. v. Ross et al., 150 Ill. 50; Farwell et al. v. Nilsson, 133 Ill. 45; Lumber Co. v. Union National Bank, 159 Ill. 458.

The distinction between a mortgage and a general assignment for the benefit of creditors is sharply made in a number of cases collated and discussed in Lumber Co. v. Union National Bank, above cited. The writer of the opinion in that case discusses the principal cases on this subject, and we quote at considerable length. On page 465 of the opinion in that case the court says: "In Weber v. Mick, 131 Ill. 520, in considering the question what constituted an assignment, it was held that a voluntary assignment is an instrument in writing executed by a failing debtor, by which he assigns or transfers to some third person, as assignee, the whole of the bulk of his property, to be by such trustee distributed among the assignor's creditors in satisfaction of their demands. It differs materially from a mere sale in payment of a debt, and also from a pledge of property in the nature of a mortgage. It was also there held that a fundamental distinction between a mortgage and an assignment is, that a mortgage is a mere security for a debt, the equity of redemption remaining in the mortgagor, while an assignment is an absolute application of the property to its payment. It does not create a lien, but passes the legal and equitable title to the property absolutely beyond the control of the assignor. In Walker v. Ross, 150 Ill. 50, * * * it is said: "These cases further hold that there must be an absolute transfer of the whole interest of the assignor, legal and equitable, in the property assigned, in trust for the benefit of creditors, and hence that absolute conveyance made directly to the creditor in payment, or any form of lien so given as security for the payment of a *bona fide* debt,

Blackman v. Metropolitan Dairy Co.

though having the effect to give him a preference, is not an assignment for the benefit of creditors within the meaning of the statute." See also *Farwell v. Nilsson*, 133 Ill. 45; *Price v. Laing*, 152 Ill. 380; *Young v. Clapp*, 147 Ill. 176. Under the cases cited it is plain that in order to create an assignment within the meaning of the statute the property must be conveyed to a trustee or assignee, who is to sell it absolutely and not on a contingency, and distribute the proceeds among the creditors. The conveyance or assignment must pass the legal and equitable title with no right of redemption in the debtor."

The conveyance in the case before us is direct to the two creditors whose debts it secured, as well as to the trustee named. The trustee is not to sell it absolutely, but only on a contingency. The conveyance does not pass both the legal and equitable title, with no right of defeasance or redemption in the grantor. The condition of defeasance is clearly expressed in the instrument as follows:

"Therefore if the said party of the first part shall well and truly pay off and discharge the several debts above mentioned, and interest thereon, which are now due, upon demand being made therefor, and shall well and truly pay off and discharge the several debts above mentioned and hereafter to mature, when they become due and payable, according to their tenor, then this conveyance shall become void, otherwise to remain in full force and effect."

The transaction is clearly not an actual assignment, and under the act of 1877 there can be no such thing as a constructive assignment for benefit of creditors. *Price et al. v. Laing*, 152 Ill. 380; *Walker et al. v. Ross et al.*, 150 Ill. 50.

We are of opinion that the transaction in this case does not constitute such an assignment as falls under the statute forbidding preference, but that the instrument is in effect a mortgage; that the learned chancellor who tried the case in the Circuit Court erred in holding the conveyance to be in effect a deed of assignment for the benefit of creditors, under the act of 1877, and in all his orders entered in pursuance of such holding; and in refusing to grant, in favor of

appellants, a decree of foreclosure declaring appellant's debts secured by said instrument to be a first and prior lien, and the debts due to the attaching appellees to be junior and subject thereto.

Appellant's prayer for strict foreclosure ought not to be granted.

"Although in some cases where it appears that the property is of less value than the debt, and the mortgagor is insolvent, and the mortgagee is willing to take the property in discharge of his debt, a strict foreclosure will be allowed, yet it ought not to be granted where there are other incumbrancers or creditors of the mortgagor." Greenemeyer v. Deppe, 6 Ill. App. 490.

Cause reversed and remanded, with directions to the Circuit Court to enter a decree not inconsistent with this opinion.

Reversed and remanded with directions.

Adam Emig v. John A. Barnes, Assignee, etc.

1. TRUSTS—*Duty of Courts in Administering*.—Courts, in the administration of a trust fund, should not allow the fund to be unnecessarily depleted for any purpose.

Voluntary Assignments.—Error to the County Court of Clay County: the Hon. BEN. HAGLE, Judge, presiding. Heard in this court at the February term, 1898. Reversed and remanded. Opinion filed September 9, 1898.

STATEMENT.

On the 10th of June, 1893, Henry A. Blanck confessed a judgment, in vacation, in the Circuit Court of Clay County, in favor of E. A. Medley, for the sum of \$1,540—\$40 of which was for attorney's fees. On the morning of the 20th of the same month he confessed another judgment in the same court in favor of Janis Saunders & Co. for \$586.35—

\$53.35 of which was for attorney's fees; and on the same day executions were issued on both judgments, to the sheriff of the county, who levied them on a stock of goods owned by Blanck. A few hours after the levies were made and on the same date, he made an assignment of his property for the benefit of his creditors, to defendant in error. Plaintiff in error was a creditor of the insolvent for a much greater sum than that of all the other creditors combined, including the two judgment creditors, and he gave notice of a contest of the judgments and levies as well as a claim of one August Hartman for labor. Thereupon the County Court of Clay County, by consent of all parties, entered an order that the stock of goods be turned over to the assignee, to be by him sold, and the proceeds of the sale held by him to abide the result of the contest; and the assignee sold the stock for \$4,000.

The matter of the contest was taken by change of venue to the Circuit Court of Marion County, which, after considerable delay, decided that the liens of the executions, except as to the attorney's fees, were valid first liens on the property, and ordered them paid. And the court further found "that as to all other matters of contest the issues are found against the said Adam Emig, the contesting creditor."

After the termination of the contest, defendant in error filed his report in the County Court of Clay County, in which he charged himself with the sum of \$4,519.58 received from all sources, and credited himself with the payment of the two executions, less the attorney's fees, also with \$400 paid to the insolvent, as his legal exemptions, with other small items of costs and expenditures in the administration of the estate, and also credited himself with \$214 paid to "August Hartman account," and attorney's fees amounting to \$350. He also asked credit for \$700 for "assignee's fees and expenses."

Plaintiff in error filed exceptions to the allowance of the sum paid Hartman, as well as the attorney's fees and assignee's fees. The court not only overruled the exceptions but heard evidence, and increased the attorney's fees \$250, to which plaintiff in error excepted.

VAN HOOREBEKE & LOUDEN, attorneys for plaintiff in error.

HOFF & HOFF & SHRINER, attorneys for defendant in error.

MR. JUSTICE BIGELOW delivered the opinion of the court.

The assignments of error bring before us only the order overruling the exceptions to the assignee's report, and the order approving it, with the further order allowing the additional attorney's fees.

As to the item of August Hartman's claim, the exceptions to it were in issue on the trial had in the Circuit Court of Marion County. That court sustained the exceptions of the contesting creditors as to certain items of claims therein named, not including Hartman's claim, and the record recites that "the court further finds that as to all other matters of contest, the issues are found against the said Adam Emig, the contesting creditor." We are of opinion this judgment warranted the County Court in approving the item in the assignee's report as to Hartman's claim.

From a careful examination of the record we are unable to discover any necessity for the employment by the assignee of so many attorneys.

The contest between the plaintiff in error, and the parties who had recovered judgments against the insolvent, and had their executions levied, for some reason lingered in the courts for some time, but the matter was attended to by attorneys employed and paid by the contestants, and was no concern of defendant in error.

Courts in the administration of a trust fund should not allow the fund to be unnecessarily depleted for any purpose.

As to the item of assignee's fees and expenses, there is nothing in the case that will warrant a court in allowing more than the usual rate fixed by law, for the administration of estates of deceased persons, which is six per cent on the sums received and paid out; and even if defendant in error was put to a considerable trouble in the matter, as he claims, he will be well recompensed by commission on the whole sum which passed through his hands, including over

Peirce v. Rabberman.

\$2,000 paid to the two preferred creditors on account of their prior execution liens on the stock of goods, which he sold *en masse*.

Appellant insists that appellee should account for interest on the fund that remained in his hands for several years. Of course, if he used the fund, or any part of it, or received any interest on it, he should account for it, as that is only common honesty; but there is no evidence in the record that he did use it or that he received any interest on it; and as he was not the cause of the delay in disbursing it, we are not prepared, under the circumstances appearing in the case, to hold him for more than the principal of the fund.

Because the County Court erred in approving the report of the defendant in error as to the item of attorney's fees paid, and the assignee's claim for fees and expenses, as well as in allowing further attorney's fees not contained in the report of the assignee, the order and decree of the court in those respects is reversed and the cause remanded, with directions to allow the assignee a credit of \$250 for all attorney's fees paid and to be paid by him, and to allow him six per cent commission on all moneys received and paid out by him. Reversed and remanded.

**R. B. F. Peirce, Receiver of the Toledo, St. L. & K. C.
R. R. Co., v. F. Rabberman.**

1. VERDICTS—*Unsupported by the Evidence*.—When there is an entire lack of evidence to support a verdict the judgment based upon it must be reversed.

Trespass, to personal property. Trial in the City Court of East St. Louis; the Hon. B. H. CANBY, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the February term, 1898. Reversed. Opinion filed August 31, 1898.

CHARLES A. SCHMETTAU and MESSICK & MOYERS, attorneys for appellant.

SILAS COOK and T. M. MOONEYHAM, attorneys for appellee.

MR. JUSTICE BIGELOW delivered the opinion of the court.

Appellee sued appellant before a police magistrate of the city of East St. Louis, and recovered a judgment for \$5 damages and \$10 attorney's fees for killing a hog and a pig, the property of appellee. Appellant appealed to the City Court of East St. Louis, where appellee again recovered the same amount as damages, and \$50 attorney's fees, and the case is brought here by appellant, who assigns the judgment as error, with other errors which need not be noticed.

Counsel for appellee "insist" that we shall read the entire evidence in this case and we have done so in the hope of finding something more in it to sustain the judgment than we find in the abstract, but we are unable to say that we have succeeded.

The evidence shows that appellee's pig was found in the ditch at the side of the railroad track, dead, but without a bone broken or a bruise on it, and what caused its death no witness has undertaken to explain. Appellee testified, however, that "the sow had rooted and the pigs got through there." This is all the evidence there is about the pig, and appellant's counsel, probably realizing its insufficiency to sustain the judgment so far as the pig is concerned, have, as we understand them, abandoned the attempt to defend it by saying nothing whatever about the pig or how it came by its death.

As to the hog, it appears from the evidence to have been in appellee's yard next to the railroad and probably got out of the yard by loosening some of the wires of the fence near the cattle-guard, and strayed into a public highway and from thence into the field of a neighbor of appellant, from which it got upon the railroad track, fifty rods or more from the yard where it was kept.

The railroad fence along appellee's hog yard was built by appellee for the railroad company, for which the company had paid him. The undisputed evidence shows that the servants of appellant, whose duty it was to look after the fence and see that it was kept safe and in good repair, were diligent and careful in the performance of their duty in that

McMahon v. Thane.

respect and had not discovered that the fence was out of repair, nor had appellee informed them that it was, if he knew. The evidence fails to show that any person saw the hog when it got out of the yard where it was kept, or after that, until it was found dead and mangled on the railroad.

Appellant was, for all the purposes of this case, the owner of the railroad, and the duties devolving upon him were the same as would have devolved upon the company of which he was receiver had it been operating the road. It would not have been an insurer of stock that strayed upon its right of way, but would have been bound to respond in damages for loss of or injury to stock caused by its neglect of duty or gross carelessness.

There is an entire lack of evidence tending to show carelessness in running over and wantonly killing the hog.

It is true that it was the general duty of appellant to keep the fence along the right of way of the railroad in a reasonably safe condition to turn stock, but this rule is not absolute without conditions. It has its limitations.

Appellant was not bound in the performance of his duty toward the owners of the land on each side of the railroad to keep a sentry at all hours to watch the fence of the road to see that hogs or other stock did not break the boards or wires of them, and to instantly repair them if broken, but it was his duty to keep a reasonable watch over them, in the day time, and this the evidence shows he did do, and there is none showing the contrary.

It therefore follows that the verdict of the jury was wrong, and the judgment of the court entered upon it is reversed.

Frank McMahon v. William Thane.

1. **VERDICTS—Upon Conflicting Evidence.**—Where a case involves questions of fact for the jury, the finding will prevail.

Attachment.—Trial in the Circuit Court of St. Clair County, on appeal from a justice of the peace; verdict and judgment for plaintiff

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McMahon v. Thane.

Appeal by defendant. Heard in this court at the February term, 1898.
Affirmed. Opinion filed August 31, 1898.

MAURICE V. JOYCE, attorney for appellant.

W. H. BENNETT and A. A. HUNT, attorneys for appellee.

MR. PRESIDING JUSTICE CREIGHTON, delivered the opinion of the court.

This was a suit in attachment, commenced before a justice of the peace, by appellee against appellant, to recover a balance claimed by appellee from appellant, for board, cash loaned, and merchandise. The case was appealed to the Circuit Court of St. Clair County, where a trial was had by jury, resulting in a verdict and judgment in favor of appellee for \$100.

The only ground urged for reversal is that the verdict is manifestly against the weight of the evidence.

We have carefully examined all the evidence, and as to some of the items in dispute, it is directly conflicting and contradictory.

Appellee's testimony clearly shows that appellant was indebted to him in a much larger sum than he recovered, and he is fully corroborated by his books, admitted in evidence without objection.

Appellant denied that he was indebted to appellee in any sum, and stated that he had not boarded with appellee the full time charged against him, and that certain of the charges for money and merchandise were false, and he was more or less corroborated by a number of witnesses.

As to some of his statements he was quite fully corroborated.

The state of accounts between these parties, as the case was submitted, was purely a question of fact for the jury; the jury was fully warranted, by the evidence, in its finding.

The case was fully and fairly tried, and we think substantial justice prevailed.

The judgment of the Circuit Court is affirmed.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

SECOND DISTRICT—MAY TERM, 1898.

William Kramer v. Mary Biss.

1. *COURTS—Erroneous Action by the Presiding Judge.*—The act of the presiding judge during the progress of a trial in asking leading and suggestive questions of a hesitating witness during a cross-examination is reversible error.

Assumpsit, for breach of marriage contract. Trial in the Circuit Court of Livingston County; the Hon. GEORGE W. PATTON, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the May term, 1898. Reversed and remanded. Opinion filed September 26, 1898.

JOHN H. SHAY and ARTHUR H. SHAY, attorneys for appellant.

A. P. WRIGHT and SAMUEL P. HALL, attorneys for appellee.

MR. JUSTICE WRIGHT delivered the opinion of the court. The jury in the trial court awarded the appellee \$2,175 damages against appellant for a breach of a promise to marry, and the court, after requiring a remittitur of \$675, overruled appellant's motion for a new trial and gave judgment against him for \$1,500, from which he has appealed to this court. Appellant, by his counsel, has insisted that

the verdict is contrary to the evidence, the court admitted improper evidence, asked improper questions of the witnesses, misdirected the jury and refused it proper instructions, and that the damages for which the judgment was rendered are excessive. There is no conflict in the evidence concerning the promise of appellant to marry the appellee, nor as to his refusal to do so, both these essential points being in effect conceded, and that the marriage was to have occurred March 10, 1897, and substantially all preliminary preparations and arrangements for the wedding had been completed. Both contracting parties had lived, about six years, within a short distance of each other, upon neighboring farms—the appellant alone, the appellee with her father, and from the length of time they had lived so near each other, it is but reasonable to suppose they knew something of one another, if not personally acquainted in the common acceptance of that term.

Appellant at the trial sought to justify his refusal to marry the appellee, and renews the same excuse in this court, upon the ground of alleged improper conduct of the appellee occurring after his promise to marry her. It appears from the evidence that on February 27, 1897, the parties went to Streator together, when appellant purchased a ring for appellee, and there made some other preparations for the marriage. They had previously accepted an invitation to attend a party at the home of a neighbor, to be given that evening; and on the way there they drove to the house of appellant, where the young woman prepared supper, after which they drove to Rush's, the place of the party. They left Rush's between twelve and one o'clock that night. After this time there is much conflict in the testimony of the two parties with reference to what occurred, except that both agree they went to the home of appellant and there slept in the same bed until the next morning, and that no illicit intercourse was indulged in, although appellee claims it was attempted by appellant, and because of her resistance remained unaccomplished. They each accuse the other with being at fault for the indiscretion of this night, appellant

insisting appellee did it against his objection, while on the other hand, she insists she was persuaded thereto by appellant. This contention of the parties was a material issue of fact, and vital to both sides of the case, requiring accurate and proper rulings of the court upon questions affecting it, both in the admission of evidence and the examination of the witnesses. In her examination in chief appellee was asked the question: "State to the jury what took place after you went in the house? A. Stood by the stove awhile; afterward he said it was time to go to bed, and he went; of course he wanted me to go with him." On the cross-examination concerning this point the appellee had stated that after appellant went to bed she stood by the stove about ten minutes, and the question was then asked: "Well, where did you go when you first moved, after he had gone to bed, and you were standing there ten minutes; then where did you move?" There was no answer to this question, and it would seem the witness was either abashed or unwilling, but in either case it was the right of counsel to have the jury see the conduct of the witness, and determine her motives and credibility, without interference with such right. It was also the privilege of counsel to insist upon an answer to the question or to waive the answer, and at this particular point in the cross-examination they could demand this privilege as a right. The court, however, while the question just quoted was pending and unanswered, of its own motion, then asked the witness: "Did you afterward go into the bedroom? A. Yes." "By the Court: Did you go in voluntarily or did he pull you in?" To this question the defendant objected, but the court overruled the objection, to which exception was duly taken. The witness then answered, "He pulled me in." We think this action of the court unduly deprived the appellant of the proper force of his cross-examination of one of the interested witnesses; besides, the question was leading and suggestive, and also improper, because defendant testified he had assigned another room to plaintiff and had not invited her to his apartments. This action of the court was such an error, in

view of the amount of damages assessed, as requires a reversal of the judgment. See *Dunn v. People*, 172 Ill. 595.

Complaint is made of the instructions to the jury, but we find no material error in them, and inasmuch as the cause must be remanded for another trial, we refrain from discussing the question made against the damages as being excessive.

For the error indicated, the judgment of the Circuit Court will be reversed and the cause remanded.

77 626
178 449

Joseph B. Richardson v. Marcia K. Mather.

1. **ALTERATION OF INSTRUMENTS—*Ratification.***—A payment on either principal or interest with knowledge of the alteration, amounts to a ratification and removes the presumptive effect of the alteration.

2. **SAME—*Addition of an Attesting Witness.***—In order to show that the addition of an attesting clause and witness to a promissory note made in another State is material, the law of such State, making the alteration so, must be proved.

3. **PLEADING—*Plea Must Deny or Confess and Avoid.***—A plea must deny or confess and avoid.

Assumpsit, on a promissory note. Trial in the Circuit Court of Henry County; the Hon. HIRAM BIGELOW, Judge, presiding. Finding and judgment for plaintiff. Appeal by defendant. Heard in this court at the May term, 1898. Affirmed. Opinion filed September 26, 1898.

STATEMENT.

On May 6, 1897, appellee began this action by suing out an attachment in the Circuit Court of Henry County, and the writ was served upon certain persons as garnishees. Defendant filed pleas to the declaration, and upon issues joined there was a trial without a jury and a judgment for plaintiff for \$5,300 and costs. A rule was entered on the garnishees to answer interrogatories at the next term. Defendant then appealed to this court.

Richardson v. Mather.

The declaration consisted of a special count upon a promissory note, and the common counts. Defendant filed four pleas: the first, non-assumpsit, upon which issue was joined; the second, a special plea, to which a demurrer was sustained and defendant abided by said plea; the third, the ten years statute of limitation, to which plaintiff replied double—that the cause of action did accrue within ten years before the action was begun, and a payment on said note by defendant within said ten years, by reason of which payment said cause of action accrued to plaintiff within said ten years; and the fourth, the six years statute of limitations of the State of Vermont, where the note was made; to which plaintiff replied double, that the cause of action did accrue within six years before the action was begun, and a payment on said note by defendant within said six years, by reason of which said cause of action did accrue to plaintiff within said six years. To said replications of payments within ten and six years, respectively, defendant demurred; the demurrers were overruled, and defendant elected to abide by his demurrers. With the pleas was filed an affidavit of the truth of the second plea, and that the defendant verily believed he had a defense upon the merits to the whole of plaintiff's demand.

SCOTT & COOK, attorneys for appellant.

In States where a distinction is made by the statute of limitations between witnessed and unwitnessed notes, it is clear that the addition of a name to the note after its delivery, which name purports to be the signature of an attesting witness, when such witness did not in fact see the signing, is a material alteration of the note, as to all parties not consenting, because it changes the legal effect of the instrument. Daniel on Negotiable Instruments (4th Ed.), Secs. 1392–1393; 2 Parsons on Notes and Bills, 553–554; Vol. 2 Am. & Eng. Ency. of Law (2d Ed.), page 245; Homer v. Wallis, 11 Mass. 309–312; Adams v. Frye, 3 Met. (Mass.) 103; Smith v. Dunham, 8 Pick. (Mass.) 246; Milbery v. Storer, 75 Me. 69.

Such an alteration is also material where, under the laws

of the State where the note was made, the payee would be entitled to show the execution of the note by proving the handwriting of the attesting witness, in case such witness was beyond the jurisdiction of the court. *Hall v. Weaver*, 34 Fed. Rep. 104-110; *Marshall v. Gougler*, 10 S. & R. 164.

The Massachusetts general statute of limitations excepts "any note in writing made and signed by any person or persons and attested by one or more witnesses," and such notes are placed in the same category as bonds and similar specialties, and the statute prescribes a longer period within which a suit may be brought. *Smith v. Dunham*, 8 Pick. 246-8.

In Vermont the precise question here arising does not seem to have been determined, but the general doctrine is of course announced that any material alteration avoids the instrument. *Bigelow v. Stilphen*, 35 Vt. 521; *Broughton v. Fuller*, 9 Vt. 373.

In an action brought in this State upon a promissory note made in another State, the laws of the State where the note was made and delivered will govern as to the defenses which can be set up against a recovery thereon. *Pope v. Hanke*, 155 Ill. 617-627.

To constitute a material change in a written contract it is not necessary that the obligation of the contract should be altered. If its legal effect or operation is in any way changed it is materially altered, whether the change be made in respect to the obligation which it imports, or to its force as a matter of evidence. *Daniel on Negotiable Instruments*, Sec. 1373.

Now, by the averments of the plea, this note, as it was given, would only have been evidence of the indebtedness sufficient to warrant a recovery for a period of six years after action accrued. If altered, as the plea avers, and as defendant offered to prove, it would have been evidence of the indebtedness sufficient to warrant a recovery for fourteen years after action accrued. Therefore its force as a matter of evidence was changed.

"A material alteration of an instrument is one which

causes it to speak a language different in legal effect from that which it originally spoke." 2 Am. & Eng. Ency. of Law (2d Ed.), page 185; *Wheelock v. Freeman*, 13 Pick. 165-168.

Where words are added to a note, as here, we take it the true test is, would such words be mere surplusage if they had been properly placed on the note when it was made? If so, the alteration is immaterial. If not, the alteration is material. It will not be contended, we apprehend, that the word and signature added here would be surplusage had it been properly and lawfully placed on the note.

Further, the common law, so far as applicable to the local situation and not repugnant to the constitution and enacted laws, is in force in Vermont. Vermont Statute, Revision of 1894, Sec. 898.

By the common law, proof of the handwriting of an absent witness is sufficient evidence of the execution of the instrument. 1 Wharton's Evidence, Sec. 726; *Valentine v. Piper*, 22 Pick. 85-90.

By adding the name of an attesting witness, therefore, the payee would become entitled to prove the execution of the note by proving the signature of the attesting witness, if the witness was beyond the jurisdiction of the court. In this way an alteration of the contract by attaching the signature of a witness becomes material by placing in the hands of the payee another method of proving the due execution of the instrument. *Adams v. Frye*, 3 Met. (Mass.) 103-107; *Hall v. Weaver*, 34 Fed. Rep. 104-110.

HAND & HAND, attorneys for appellee, contended that adding the signature of attesting witness to a promissory note after execution is not a material alteration. *Fuller v. Green*, 64 Wis. 159; *Blackwell v. Lane*, 4 D. & B. (N. C.) 113; *McCraw v. Gentry*, 3 Campb. 232; *Talbot v. Hodson*, 2 Eng. C. L. 25; *State v. Gherkin*, 7 Ired. (N. C.) 206.

A party to an altered instrument who makes an unconditional payment thereon will be considered as having ratified the change. *Johnson v. Johnson*, 66 Mich. 525; *Evans*

v. Forman, 60 Mo. 449; Wright v. Buck, 62 N. H. 656; Prouty v. Wilson, 123 Mass. 297; Cariss v. Tattersall, 2 M. & G. 890, 40 E. C. L. 677; Walker v. Warfield, 6 Met. (Mass.) 466.

New consideration not necessary for payment, promise to pay or extension of time, to amount to ratification of altered instrument. Montgomery v. Crossthwait, 90 Ala. 553; Pelton v. Prescott, 18 Ia. 567.

Retaining the consideration in payment of which an altered note is given amounts to a ratification thereof. Canon v. Grigsby, 116 Ill. 151.

An alteration when not apparent upon the face of instrument must be shown by the party alleging alteration. Lowman v. Aubery et al., 72 Ill. 619.

A witnessed note may be declared upon in common form. Carpenter v. McClure, 38 Vt. 375; Bragg v. Fletcher, 20 Vt. 351.

The attestation of the signature of one maker of a promissory note which is subsequently signed by another person, whose signature is not attested, does not make the note a witnessed note as to the last maker, but only as to the first. Walker v. Warfield, 6 Met. (Mass.) 466; Lapham v. Briggs, 27 Vt. 26.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

At the trial plaintiff offered in evidence the following note:

"\$5,000.

CHESTER DEPOT, VT., Dec. 3d, 1879.

For value received, we jointly and severally promise to pay Mrs. Marcia K. Eaton, or her order, five thousand dollars on demand, with interest annually.

PHILEMON H. ROBBINS.

JOSEPH R. RICHARDSON.

R. P. POLLARD.

Witness: CHAS. ROBBINS."

Upon the back thereof were fourteen indorsements of payments of interest, the last being for the year ending December 3, 1896. Defendant objected to the note upon

one ground only, namely, that the declaration did not count on a witnessed note; that by the law of Vermont there is a material difference between a witnessed note and one not witnessed; and therefore there was a variance between the note counted on and the note offered in evidence. This objection was overruled, and properly so. The law of Vermont was not then in evidence, and the court could not judicially know that it was as stated in the objection; and the note was competent evidence under the common counts, even if not under the special count. Defendant objected to the introduction of the indorsements of payments on the back, because not connected with the defendant, and the objection was overruled. No doubt this objection should have been sustained when made, but the payments so indorsed were shortly afterward proved by defendant and other witnesses, and the objection was overcome by the proof. It was proved the rate of interest allowed upon such a note by the laws of Vermont at the time it was given was six per cent. Plaintiff called defendant as a witness, and proved by him, and also by other witnesses, that shortly after each annual installment of \$300 interest became due on said note, on December 3, 1894, 1895 and 1896, defendant paid one-half of said several installments, and that all interest to December 3, 1896, had been paid, and no interest since that date, and none of the principal. Plaintiff's name had been changed from Eaton to Mather by a marriage in 1882.

Defendant sought to relieve himself from liability upon the note by proving that, by the laws of Vermont, the statute of limitations bars an action on an unwitnessed note in six years, but does not bar an action on a witnessed note till the expiration of fourteen years after maturity; that when this note was signed by the several makers it was not witnessed, and that the words, "Witness: Chas. Robbins," were added after the signatures and without the knowledge or consent of defendant; that the note was not signed in the presence of any attesting witness, and that defendant never acknowledged his signature to Charles Robbins. It

is claimed that there was therefore a material alteration of the note after it was executed and delivered by defendant, and therefore it is void. Assuming that the addition of a witness clause would be a material alteration of the note, and that defendant can introduce such evidence without a sworn plea denying the execution of the note sued upon (Rev. Stat., Chap. 110, Sec. 33), still we think the evidence defendant introduced, and offered to introduce, did not make out the alleged defense. He had made three several payments of interest on or shortly after December 3d, in each of the years 1894, 1895 and 1896. Payment on either principal or interest, with knowledge of the alteration, amounts to a ratification or removes the presumptive effect of the alteration. 3 Randolph on Commercial Paper, Sec. 1774; Walker v. Warfield, 6 Metc. 466; Johnson v. Johnson, 66 Mich. 525. Defendant sought to avoid this rule by testifying he had not seen the note from the time he signed it till depositions were taken in this cause. He did not testify nor offer to prove that when he made these payments he was ignorant of the fact that an attestation clause had been added. He was seeking to make this technical defense soon after his repeated recognition of his liability on the note by payments thereon. As his payments had already been proved, he was bound, we think, to overcome their ordinary effect by showing he made them without knowledge of the alteration, a matter resting peculiarly within his own breast.

The original note is not before us. As copied into the record when offered in evidence the attestation clause is wholly below all the signatures. It may be it was designed when put there to apply only to the signature of Pollard, the last maker. We are not aware of any conclusive presumption of law that such an attestation was designed to apply to each of the several signatures. Defendant did seek to show that Pollard did not sign in the presence of any attesting witness, but it may have been added by Pollard's subsequent consent or acquiescence, and may have been intended to apply to his signature only. Defendant did

Richardson v. Mather.

not offer to prove it was added without Pollard's knowledge and approval. Even where the law is held as appellant contends, the motive with which an attestation clause is added is material. Here defendant made no attempt to prove when or by whom or for what purpose the attestation clause was added, nor whether the plaintiff was cognizant thereof. In *Homer v. Wallis*, 11 Mass. 309, relied upon by appellant, it was proved attestation was added by procurement of the promisee to give a validity to the note which, as he supposed, it did not have when signed. It was held in *Smith v. Dunham*, 8 Pick. 246, that in the absence of a fraudulent intent the addition of the attestation clause by one cognizant of the facts (as Charles Robbins may have been here), would not amount to a technical alteration of the note, though it would not prevent the running of the statute of limitations against it as an unwitnessed note. In *Adams v. Frye*, 3 Metc. 103, the proof showed that after the bond was signed, and in the absence of the obligors, the obligee procured another to sign as a witness, and it was held that this proof authorized the jury to infer a fraudulent intent, and called upon the obligee to rebut such inference of fraudulent intent, and that if he could rebut it the obligation would not be discharged. In each of these cases the person assailing the validity of the note seems to have been the party who introduced affirmative proof of the manner in which the attestation clause was added, and apparently it was necessary for him to introduce some evidence tending to show that it had been added for a wrongful purpose before the burden was cast upon the other side. The defendant did not prove or offer to prove such a state of facts in this case.

But again, according to the testimony of defendant himself, his last payment of interest on this note was \$151.08, on January 17, 1897. No statute of limitations has therefore barred an action against him, even if it was an unwitnessed note. This proof eliminated from this case the statute of limitations as a defense. The contract was complete without an attestation. Plaintiff is not claiming any-

thing by reason of said attestation. Plaintiff did not declare upon the attestation in her declaration, and it is not part of the contract between defendant and herself. It seems to us the better doctrine is that the question when the witness clause was written is not material unless the note is barred if the six year Vermont statute be applied, and not barred if the fourteen year Vermont statute be applied. Then it would be material to know whether the witness did see the makers sign, and did witness it at their request, or with their knowledge and consent. This seems to have been the view taken in *Walker v. Warfield*, *supra*. In that case Warfield denied the signature of the note by an entry upon the docket, which seems to have been equivalent to a plea, and he offered proof that if he signed the note, he did so without the presence or knowledge of the attesting witness. The court also assumed the defense of the statute of limitations was sufficiently before the court. The court then said, "The fact of a payment made by him within six years was proved by competent evidence, and therefore it became immaterial to inquire whether the attestation applied to his signature or not."

We think the second plea did not present a defense. After stating that plaintiff's only cause of action was the note in the first count of the declaration described, it alleges that defendant "did not make and did not deliver the said promissory note in manner and form as the plaintiff hath above complained against him, in this, to wit," etc. The qualification prevents the quoted words from being a denial of the execution and delivery of the instrument. Then the pleader proceeds to state that on the day of the date of said note defendant and plaintiff were residents of Vermont and had been ever since; that on that day Philemon H. Robbins and defendant and R. P. Pollard made, executed and delivered to plaintiff in Vermont a note of the date, amount, time and terms mentioned in the first count of the declaration, and that that was the only note payable to plaintiff defendant ever signed, but that when said note was signed and delivered by defendant, Charles Robbins was not pres-

ent, and said last mentioned note was not signed in his presence by defendant, and defendant never acknowledged to Charles Robbins that he had signed such note last mentioned, and never authorized Charles Robbins to sign it as a witness to the signature of defendant; that the note mentioned in the declaration bears the name of Charles Robbins as an attesting witness to the signature of all the supposed makers, including defendant's, and purports to have been signed by all the makers in the presence of Charles Robbins as an attesting witness; and that the note which defendant signed was not signed by defendant in the presence of an attesting witness. The plea then sets up the statutes of limitations of Vermont as to witnessed and unwitnessed notes, and concludes with a verification. A plea must deny or confess and avoid. This plea does neither. Except with the qualification above stated, this plea does not deny that defendant signed and delivered the note described in the declaration, and with the qualification it is not a denial. The plea describes a note which defendant admits he did sign, but he refrains from admitting or denying that it was the note declared upon. He states there is an attestation clause to the note declared upon, and there was none to the note he signed, but he does not state whether they are the same or different notes. He does not confess it is the same note, and seek to avoid it by charging it has been altered by adding an attestation clause since he signed and without his consent. We think the plea in other respects insufficient, and that the demurrer was properly sustained thereto. The judgment will be affirmed.

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87	391

Lewis E. Payson v. Florence Ross et al.

1. **EQUITY PRACTICE**—*When Interlocutory Decrees Become Final.*—When a party moves to amend an interlocutory decree of a former term requiring him to account, etc., in certain matters, he is at the final hearing bound by the terms of that decree. The denial of his motion to

change, amend or modify it, and the same not having been modified or changed by the court, gives it all the force and effect of a final decree, as to the matters therein adjudicated.

2. TRUSTEES—*Not Entitled to Compensation Unless by Contract.*—A trustee can not receive compensation for his services as such, without a contract therefor.

Bill for an Accounting.—Trial in the Circuit Court of Livingston County; the Hon. JOHN H. MOFFETT, Judge, presiding. Hearing and decree for complainant. Appeal by defendant. Heard in this court at the May term, 1898. Reversed and remanded. Opinion filed September 26, 1898.

N. J. PILLSBURY and C. C. STRAWN, attorneys for appellant.

The decree of the court below—that appellant should be charged only with all rents and profits he has received from said lands, and what he has lost by willful default or gross negligence, if any, and all moneys received by him on sales—was right. *Roberts v. Fleming*, 53 Ill. 196; *Mosier v. Norton*, 100 Ill. 63; *Moshier v. Norton*, 83 Ill. 524; *McDole v. McDole*, 39 Ill. App. 274; 2 Jones on Mtgs., Sec. 1121, *et seq.*

Appellant was entitled to credit for cost of land; all taxes paid; cost of all necessary and permanent improvements, and all reasonable repairs, etc. Cases, *supra*; *Ross v. Payson*, 160 Ill. 349.

Also to credit for money paid for insurance of the buildings. 27 Am. and Eng. Ency. 163, note to same; *Perry on Trusts*, Sec. 478.

The trustee is justified in insuring, and in case of loss, the insurance money would belong to the *cestui que trust*. *Lewin on Trusts*, etc., 580.

EZRA M. PRINCE and CHARLES L. CAPEN, attorneys for appellees.

Where a party is required by decree to account, the burden of proof is upon him, and he can only be allowed such credits as he clearly establishes by proof. *Heffron v. Price*, 40 Ill. App. 244; *Hooper v. Winston*, 24 Ill. 353; *Daniell's Chy. Pr.*, 1224; 2 Story's Eq. J., par. 1277.

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A trustee *mala fide* is not entitled to compensation for services. 27 Am. and Eng. Ency. of Law, 187; Lehman v. Rothbarth, 159 Ill. 270 (281-2).

The amount of compensation for improvements is measured by the amount of benefit conferred. Smith v. Knoebel, 82 Ill. 392 (405); Dean v. O'Meara, 47 Id. 120; Lagger v. Mut. L. Ass'n, 146 Id. 283 (297); Breit v. Yeaton, 101 Id. 242 (272-3); Ebelmesser v. Ebelmesser, 99 Id. 548; Williams v. Vanderbilt, 145 Id. 251.

Even where a trustee acts in good faith he is not entitled to compensation for services, in the absence of an express contract for such compensation. Lehman v. Rothbarth, *supra*; Hough v. Harvey, 71 Ill. 72.

Even where a trustee acts in good faith, but uses the trust fund, and has failed to keep any exact account of the same, or has refused to render an account to the beneficiary, the law will require him to account with interest computed with annual rests. Ogden v. Larrabee, 57 Ill. 389 (409); Bond v. Lockwood, 33 Id. 212.

A decree is interlocutory and not final until there has been a final disposition of the case that admits of no further litigation in the court of original jurisdiction. Gunn v. Donoghue, 135 Ill. 479; Thompson v. Follansbee, 55 Id. 427; R. & M. R. R. Co. v. F. L. & T. Co., 70 Id. 249; Hunter v. Hunter, 100 Id. 519; C. & N. W. R. R. Co. v. Chicago, 148 Id. 141 (152-3); Gade v. Forest G. R. Co., 158 Id. 39.

While interlocutory the court will look into the case to see if it would make the same decree a second time. Adams' Eq. 416; Wadhams v. Gay, 73 Ill. 415 (430); Shepard v. Speer, 41 Ill. App. 211.

MR. JUSTICE WRIGHT delivered the opinion of the court.

Originally this was a bill in equity, filed by the appellees against appellant, to set aside certain conveyances of real estate by Franklin Oliver, in his lifetime, to appellant, and is reported in 160 Ill. 349. The present decree, from which appellant prosecutes this appeal, relates to the accounting for rents and profits, and for improvements, taxes, etc.,

incident to the decree directed by the Supreme Court in the decision to which we have referred. At the May term, 1896, the court entered the decree directed by the Supreme Court; and in it, among other things, it is found that as to lands not sold by Payson he paid certain moneys and performed services for Franklin Oliver for said lands; that he has made valuable and permanent improvements thereon; paid taxes on the same; made necessary repairs; made a trip to New Jersey, paying his own and Franklin Oliver's expenses; performed fully under deed of June 19, 1879 (for 80 acres); for all of which he should be credited. That he should be charged with all rents and profits he has received from said lands, and what he has lost by willful default, or gross negligence, if any; and for all moneys received by him on sales.

Decreed: That Payson be allowed for said moneys and services; and that he be charged with said rents and profits received; and what he has lost by willful default, or gross negligence, if any; and money from sales; the account to be stated; cause referred to master, who shall find dates, amounts, etc., of payments to Oliver, to remove incumbrances, taxes, expenditures for permanent improvements, and all other credits due him, including commissions paid on sales of property. Allow complainants all sums received for rents, and any lost by willful default or gross negligence, if any; and sales; whether Payson is entitled to compensation for personal services, proofs to be taken, but question reserved.

Under the reference to the master, ordered by the decree above recited, he took the evidence and stated an account, first, by computing the interest with annual rests to January 1, each year, thereby producing a balance due Payson on the first day of January term, 1897, of \$9,480.87; and second, by computing simple interest, producing a balance due Payson on the same date of \$8,835.02. Exceptions to this report were taken by each of the parties, of which the exceptions of the complainant were sustained in part, and overruled in part; and the exceptions of Payson all over-

ruled. At this time, January term, 1897, a motion by complainants was made to amend the decree of the May term, 1896, the one we have recited; but the court overruled this motion for the reason that it was regarded as in effect final; and especially so in view of the long delay and acquiescence of all parties in stating the accounts as indicated by the evidence. After the court had sustained exceptions to the master's report, the cause was again referred to the master to restate the account, with directions as to the manner of stating it, and to disallow certain specified items of credits to appellant; finding that appellant had lost certain rents by willful default or gross negligence, and directing him to be charged therewith, with interest from January 1st, within the year for which rental is charged. The master stated the account in obedience to the direction of the court, producing a balance due from appellant at time of decree of \$6,273.29. Appellant excepted to this report, but the court overruled his exceptions, and gave decree against him for the last-mentioned sum, from which he appeals to this court, and has assigned errors upon the record; and for the alleged errors seeks a reversal of the decree.

Appellees having moved the court, at the term in which the final decree was entered, to amend the decree of the court entered at the May term, 1896, and that motion having been denied, they were at the final hearing, and still are, bound by the terms of that decree, whether it be interlocutory or final. The denial of their motion to change, amend or modify it, and the same not having been modified or changed by the court, gives it all the force and effect of a final decree, as to the matters therein adjudicated. The only questions, therefore, undetermined in that decree, are the two questions expressly reserved by it, which are as to interest computation, and compensation to appellant as trustee. Appellant's counsel, as we understand them, do not question the correctness of the decree as to simple interest on items after they are actually due, but deny the right to interest on rents that never were received, and in

this contention we agree. As regards the compensation for services to appellant, as trustee, we understand the rule to be well established that he can not receive compensation without a contract therefor. *Gray v. Robertson*, 74 Ill. App. 201; 174 Ill. 242. It follows, therefore, that the claim for compensation was properly rejected.

In the opinion of the court by which the decree was directed, it was said: "In this case we are unable to see wherein the defendant Payson can be injured by granting the prayer of the bill and cross-bill of the complainants therein. He can, by a fair accounting, be fully compensated for all the money he has expended, either in the purchase, improvement or payment of taxes upon the land. As to such of the lands as he has fairly sold, he can be required to account only for the proceeds after being reimbursed for all expenditures made by him." *Ross v. Payson*, 160 Ill. 361. In this expression of the court, if it was not intended to lay down the rule by which the account should be stated, it at least discloses one of the motives, or reasons that induced the court to reverse the former decree, and remand the cause with directions to enter the decree that was entered at the May term, 1896. That decree, as we construe it, is but an echo of the quotation we have made from the opinion of the court, both of which we deem binding upon the parties to the suit, and the court, which may be moved to carry out the directions therein contained. Both the opinion of the court and the decree equally require, although not expressed in the same words, that which is directed in decree above recited. The decree directs appellant to be "charged with all rents and profits that he has received from said lands, and what he has lost by willful default or gross negligence, if any." We are unable to agree with the learned chancellor, who heard the case in the Circuit Court, that appellant has lost rents by willful or gross negligence; we can not from the evidence, support such finding, and the decree, so far as it charges appellant with rents never received by him, is, in our opinion, erroneous. Some of the items for improvements and taxes, disallowed by the court

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as credits to the appellant, should have been, in our judgment, allowed. There seems to have been little or no denial that he paid all the taxes; and all improvements of a permanent nature should have also been allowed; such as open ditches, tile drains, granary, milk house, kitchen, and the like, which were disallowed by the court. We think the decree in these respects is erroneous and that the same should be reversed and the cause remanded, and again referred to the master with directions to state the account in accordance with the terms of the decree of the May term, 1896, and the views herein expressed. The record shows that the first report of the master produced a large balance due from appellee to the appellant. In the present condition of the record we are not of the opinion the question arises, whether the appellant could have a decree for any balance that might be produced in his favor, and therefore express no opinion concerning it. Reversed and remanded.

77	641
178a	96

Commissioners of Highways Town of Harrison v. Truman Sweet.

1. **SURFACE WATERS—*Commissioners of Highways Can Not Change the Course of.***—The commissioners of highways can not, by building a bridge across the highway, change the natural flow of surface water, so as to cast upon adjacent lands water which would not have come upon such premises in a state of nature, but which would have passed in another direction over the lands of others, and reached the highway at a bridge already in the road.

2. **EQUITY PRACTICE—*Pleading and Proofs Must Correspond.***—The rule that a party can not make one case by his pleadings and a different one by his proofs, is applicable to a defendant as well as to a complainant. The defendant is bound to apprise the complainant by his answer of the nature of the defense he intends to set up, and can not avail himself of any matter not stated in his answer even though it appears in evidence.

3. **COMMISSIONERS OF HIGHWAYS—*Can Not Plead Prescriptive Rights Existing in Adjacent Land Owners.***—In a suit against the commissioners of highways for changing the flow of surface waters, the commissioners can not plead prescriptive rights as to the flow of the water existing in

the owners of the adjacent land, who are neither parties to the suit nor asking any relief in the premises.

4. *SAME—Can Not Carry on a Litigation for the Benefit of Strangers.*—The highway commissioners have no right to injure one land owner for the purpose of benefiting another. They should not take it upon themselves to determine questions as to the flow of water, nor to initiate changes in the course of its flow, or carry on litigation for the benefit of adjacent land owners.

Bill for an Injunction.—Trial in the Circuit Court of Winnebago County; the Hon. JOHN C. GARVER, Judge, presiding. Hearing and decree for complainant. Appeal by defendant. Heard in this court at the May term, 1898. Affirmed. Opinion filed September 26, 1898.

ARTHUR H. FROST and ROBERT G. McEVoy, attorneys for appellants.

The manner of improving highways is left principally to the wise discretion of the commissioners of highways, and in the exercise of the duties imposed upon them by law they can not be interfered with unless they invade some private rights of citizens. *Young v. Commissioners of Highways*, 134 Ill. 569; *Commissioners of Highways, etc., v. Whitsitt*, 15 Ill. App. 318.

The owner of the dominant heritage, or higher tract of land, has the right to have the surface water falling or coming naturally upon his premises pass off through the natural drains upon and over the lower or servient lands. And the owner of the dominant heritage may, by ditches or drains, drain his own land into the natural and usual channel, even if the quantity of water thrown upon the servient heritage is thereby increased. *Young v. Commissioners of Highways*, 134 Ill. 569; *Peck v. Herrington*, 109 Ill. 611; *Commissioners of Highways v. Whitsitt*, 15 Ill. App. 318; *Anderson v. Henderson*, 124 Ill. 164.

The same rules are to be applied to road drainage as to farm drainage. *Commissioners of Highways, etc., v. Whitsitt*, 15 Ill. App. 323; *Commissioners of Highways, etc., v. Young*, 34 Ill. App. 178-185; *Commissioners of Highways, etc., v. Young*, 134 Ill. 569; *Peck v. Herrington*, 109 Ill. 611; *Drainage Laws of 1885, Sec. 4*; *Hurd's Stat. 1897, Chap. 42, Sec. 78, p. 664.*

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The owner of a servient heritage has no right, by embankments or other artificial means, to stop the natural flow of the surface water from the dominant heritage, and thus throw it back upon the latter. *Gormley v. Sanford*, 52 Ill. 158.

Where the natural course and outlet for water on the land of one owner is over the land of another, such course can not be obstructed. *Patneaud v. Claire*, 32 Ill. App. 554-557; *Crohen v. Ewers*, 39 Ill. App. 34-42.

It may be stated as a general principle that by the civil law, where the situation of two adjoining fields is such that the water falling or collected, by melting snow and the like, upon one, naturally descends upon the other, it must be suffered by the lower one to be discharged upon his land, if desired by the owner of the upper field. *Washburn on Easements and Servitudes*, pages 353-355.

Because water is descendible by nature, the owner of a dominant or superior heritage has an easement in the servient or inferior tenement for the discharge of all waters which by nature rise in or flow or fall upon the superior. *Kauffman v. Griesemer*, 26 Penn. St. 407.

If the water cast upon Sweet's premises at the point proposed will flow in a natural channel, he is bound to receive the same although the flow may be somewhat increased. *Peck v. Herrington*, 109 Ill. 611; *Young v. Commissioners*, 134 Ill. 569; *Guesnard v. Bird*, 33 La. Ann. 797; *Martin v. Riddle*, 26 Pa. St. 415; *Meixell v. Morgan*, 149 Pa. St. 415; *Hoester v. Hemsath*, 16 Mo. App. 485; *Burk v. Mo. Pas. Ry. Co.*, 29 Mo. App. 370; *Sowers v. Shiff*, 15 La. Ann. 300.

The lower proprietor can not obstruct the natural flow of the water. *Hughes v. Anderson*, 68 Ala. 280 (44 Am. Rep. 147); *Nininger v. Norwood*, 72 Ala. 277 (47 Am. Rep. 412); *Farris v. Dudley*, 78 Ala. 124 (56 Am. Rep. 24); *Ogburn v. Connor*, 46 Cal. 346; *McDaniel v. Cummings*, 83 Cal. 515; *Gillham v. Mad. Ry. Co.*, 49 Ill. 484; *Total v. Bonefoy*, 123 Ill. 653; *Adams v. Walker*, 34 Conn. 466; *Kauffman v. Griesemer*, 26 Pa. St. 407; *Butler*

v. Peck, 16 Ohio St. 334; Tootle v. Clifton, 22 Ohio St. 247; Sweet v. Cuts, 50 N. H. 439; Wood on Nuisances (2d Ed.), Sec. 454; Angell on Watercourses, Sec. 333.

The general principles of law on the matter of rainwater and drainage, and of the respective rights and duties of adjoining proprietors in relation thereto, are in general the same as in the case of running water—they follow nature. *Martin v. Riddle*, 26 Pa. St. 415; *Boynton v. Longley*, 19 Nevada, 72.

WORKS & HYER, attorneys for appellee, contended that a watercourse, as applied to a right to drain into it, is such a conformation of the land as to give the surface water flowing from one tract to the other a fixed and determinate course, so as to uniformly discharge it upon the servient tract at a fixed and definite point; the course thus uniformly followed by the water in its flow is a watercourse within the rule, but such course can only exist where there is a ravine, swale or depression of greater or less depth and extending from one tract to another, and so situated as to gather the surface water falling upon the dominant tract and to conduct it along a defined course to a definite point of discharge upon the servient tract. *Lambert et al. v. Alcorn*, 144 Ill. 313.

The defendant commissioners have no right under the law to cause the water accumulated upon the land on the west side of the highway, whether coming through the ditch between Grattan and Bodine, or otherwise, to flow through the highway as proposed, upon the land of appellee, there being at the point in question no natural watercourse within the rule. *Peck et al. v. Herrington*, 109 Ill. 611; *Gillham v. Madison R. R. Co.*, 49 Ill. 487; *Dayton v. Drainage Com'rs*, 128 Ill. 276; *Graham et al., Com'rs, etc., v. Keene*, 34 Ill. App. 88.

Specially is this true in the light of the fact that the ditch between Grattan and Bodine was cut through a natural barrier and conducted water which otherwise would not flow to the point of the proposed cut. *Dayton v.*

Drainage Com'rs, 128 Ill. 276; *Anderson v. Henderson*, 124 Ill. 164; *Graham et al. v. Keene*, 143 Ill. 425.

Appellants have no right to let the water through the highway at this one point, discharging it upon appellee's land in a stream, so changing the manner of its coming upon his land, even though the land on the other side of the highway may slope toward him somewhat. *American & Eng. Ency. of Law*, Vol. 24, p. 928, and cases there cited; *Wagner v. Chaney et al.*, 19 Ill. App. 546; *Mellor v. Pilgrim*, 3 Ill. App. 476; *Town of Brown v. Barrett*, 38 Ill. App. 249; *Stoddard et al. v. Filgur*, 21 Ill. App. 563.

Where the pleadings and proof fail to show that a proposed change in the highway is necessary for improving or repairing the same, a decree enjoining the prosecution of such work should not be disturbed. *Graham et al. v. Keene*, 143 Ill. 430; *Anderson v. Henderson*, 25 Ill. App. 79.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

Appellee owns the southeast quarter of the northeast quarter of section 7 in the town of Harrison in Winnebago county, and a tract of twenty-four acres next south thereof. John Dolan owns land north of appellee. The heirs of Catherine Grattan, deceased, own lands west of Dolan, and own the southwest quarter of the northeast quarter of said section 7. William Bodine owns a twenty-acre tract south of the Grattan lands. The Grattan and Bodine tracts are therefore next west of the two tracts owned by appellee. Between the lands of appellee and Dolan on the one side, and of Grattan and Bodine on the other, is a north and south highway. About three-eighths of a mile north of appellee's land Otter Creek flows in a general easterly direction and crosses the highway, and there is a bridge in the highway at that place. About half a mile directly west from the southern part of appellee's land is a lake or pond, the natural and ordinary outlet of which is due north into Otter Creek. In times of high water, the pond also overflows in a northerly and easterly direction. Several natural

draws or depressions cross the highway south of the creek and carry off these waters. There is one bridge across such a draw opposite the south part of Dolan's land, and three bridges cross three such draws opposite the north part of appellee's land. Some forty years before this suit was begun the then owner of the Grattan and Bodine lands dug a ditch east and west on the north line of Bodine's present land, extending back from said highway eighty rods. Said ditch was dug to carry a part of said overflow off the lands here called the Grattan and Bodine lands, and to carry it to the highway. The highway authorities at that time built a sluiceway across the highway at that point to let said waters across the road. At or about that time a ditch was dug in the highway, on the east side thereof, which received said waters to a greater or less extent, and conveyed them north to the draws before mentioned. At some time, variously estimated by the witnesses at from seventeen to thirty years before this suit was brought, the highway authorities closed said ditch on the east side of the highway, took out said sluiceway at the east end of said Grattan and Bodine ditch, turnpiked said road, and dug a deep ditch on the west side of said turnpike, which received the waters from said Grattan and Bodine ditch and conducted them north to said draws and bridges.

In the spring of 1897 the highway commissioners of said town decided to cut through the turnpike at a point 135 feet north of the place where said old sluiceway had formerly been, and 315 feet south of the most southern of the existing bridges, and to put in a bridge across the turnpike at that point, and thus to provide a way across the highway for the water coming from the west and from the Grattan and Bodine ditch, and to discharge said water upon appellee's land at that point. Thereupon appellee began this suit by filing a bill to enjoin the commissioners from cutting through said turnpike and putting in said bridge at that point. He set out the facts as to the location and ownership of the land, the waters and their natural outlets, the bridges already in existence, the Grattan and Bodine ditch,

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and the highway ditches; and he charged that to open said turnpike and put in said bridge would take said waters out of their natural course and cast them upon his lands to the east of said proposed bridge, and irreparably injure them. A preliminary injunction was granted and the commissioners answered. Proofs were heard and there was a decree making said injunction perpetual. From that decree the commissioners now appeal.

The commissioners, in their answer, do not claim that the proper care of the highway requires the new bridge to be put in and the proposed cut to be made through the turnpike. They do not set up in their answer that the highway, in its present condition and with its present bridges, is in any respect defective or out of repair. They do not seek to justify their proposed action on the ground that it will in any respect improve the highway. They do not suggest in their answer that they are acting for the public good. Neither in their answer nor their proofs do they deny that complainant's lands will be injured by their proposed course, and they do not offer to restore the ditch on the east side of the highway, which was some protection to the land on that side of the road when said former sluiceway was in existence at the end of the Grattan and Bodine ditch. The answer does assert the right of the commissioners to open the turnpike and build the new bridge regardless of its effect upon appellee's land, and it places that claim of right upon two grounds.

The answer is first and chiefly devoted to the claim that the Grattan and Bodine ditch was lawfully dug by the man who then owned said lands west of the road, and that it and the sluiceway across the highway at the end thereof, were constructed with the approval of the man who then owned the land east of the road, appellee's grantor; that the highway commissioners ought not to have taken out said sluiceway, and that to do so was a wrong against the owners of the Grattan and Bodine lands; and the highway commissioners here set up and plead the rights which they claim exist in the owners of said lands west of the highway, by reason of what occurred forty years before between the

adjacent land owners. The Grattan heirs and Bodine are not before the court. They have not asked any relief against appellee. We are of the opinion the highway commissioners have no right to injure appellee merely for the purpose of benefiting Bodine and the Grattans. If the Grattans and Bodine have any contract rights, or any equities against appellee, because of what occurred between their respective grantors when the Grattan and Bodine ditch was dug, that is a matter for the interested parties to litigate if they desire; but we think the highway commissioners should not take it upon themselves to determine those questions, nor to initiate this change in the course of the water and carry on litigation for the benefit of Bodine and the Grattans.

The answer secondly claims that the natural flow of the water from the west is across the highway at about the point of the proposed bridge, and therefore the commissioners may build a bridge there if they choose. We think the preponderance of the evidence is that the water from the lake or pond in question would never reach the place where the commissioners planned to put in the new bridge but for the Grattan and Bodine ditch, which ditch, we think the evidence shows, was cut through a rise of ground which would have prevented the waters from the pond coming in a state of nature to the point where it was proposed to locate the new bridge. The result of building said bridge will be to cast upon appellee's land, water which would not have come upon that part of his farm in a state of nature, but which would have passed northeasterly over the lands of Bodine and the Grattans, and reached the highway at one of the bridges already in the road. The commissioners have no right to do this, and injunction is a proper remedy to prevent the wrong. *Grattan v. Keene*, 143 Ill. 425. It is argued that to carry this water to the old bridges through the ditch on the west side of the highway is to discharge it where they have no right to carry it. We think the proof shows that is the place the overflow would have reached the highway if the Grattan and Bodine ditch had not been dug, and it is the point to

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which the highway commissioners have carried it for not less than seventeen and, perhaps, thirty years; and when it crosses the highway at that point it discharges upon the lands of appellee and not upon the lands of some stranger, but at the point where said overflowing waters crossed his land in a state of nature, and where, therefore, he is bound to receive them.

Some attempt was made by defendants to prove that the condition of the highway was such that this bridge was needed, or that to put in the new bridge would benefit the highway. The rule that a party can not make one case by his pleadings and a different case by his proofs, is applicable to a defendant as well as to a complainant. The defendant is bound to apprise the complainant, by his answer, of the nature of the case he intends to set up, and can not avail himself of any matter of defense not stated in his answer, even though it appears in evidence. *Johnson v. Johnson*, 114 Ill. 611. By filing an answer the defendant submits to the court the case made by the pleadings. *Kauffman v. Wiener*, 169 Ill. 596; *Holmes v. Dole*, *Clarke's Ch.* 71. As the answer in this case does not assert any public necessity for the proposed bridge, nor that the highway will be improved thereby, complainant was not required to meet that defense, and defendants can not ask a decree in their favor because of any evidence which they introduced on that subject. But the proof shows the commissioners have permitted the ditch on the west side of the road to become filled and clogged up to some considerable extent, and have let willows grow in it, and corn stalks, straw, hay and stubble to accumulate against the willows, to the serious obstruction of the flow of the water, and have let long grass grow under the present bridges. We conclude from the evidence that if the highway commissioners will remove the obstructions in that ditch and under the existing bridges, the proposed new bridge will not be required for the benefit of the highway. We think the answer shows this was not the reason why they planned to cut the turnpike and put in the bridge.

For the reasons stated, the decree of the court below will be affirmed.

Chicago & N. W. Ry. Co. v. Henry Toellen.

1. VERDICTS—*Against the Weight of the Evidence.*—In this case the judgment is reversed and remanded because the verdict is against the weight of the evidence.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the May term, 1898. Reversed and remanded. Opinion filed September 26, 1898.

WM. BARGE, attorney for appellant.

CHARLES W. HELMIG, VINCENT J. DUNCAN and HASKINS & PANNECK, attorneys for appellee.

MR. JUSTICE WRIGHT delivered the opinion of the court.

This was an action by appellee against appellant for personal injuries received by him, caused, as he alleges, by the negligence of the latter, while he, appellee, was with due care attempting to drive with horse and buggy across the track of the railroad at a highway crossing in the village of Spring Valley. A trial by jury resulted in a verdict and judgment for \$500 against the appellant, from which it prosecutes this appeal. Various errors are assigned, among which is, that the verdict is against the weight of the evidence and that the court gave improper and refused proper instructions to the jury.

The negligence alleged is the failure of appellant to sound a bell or blow a whistle at the time of the approach by it to the crossing in question. At the time of the injury to appellee, appellant was engaged in switching at the crossing. Appellee and his companion, Leittl, approached the crossing and saw the engine and cars, and stopped to allow the crossing to be cleared, which was done by the engine and car going south; whereupon appellee attempted to drive over the crossing, and his horse becoming frightened,

Madison v. Mangan.

he was upset on one of the rails and injured. At this time it is claimed appellant started its engine and cars north toward appellee and the crossing, thereby causing the fright and consequent injury, and upon this point much of the evidence was directed. We have examined the evidence and are compelled to conclude the great weight thereof is, that at the time of the injury the engine and cars were not in motion, but standing still upon the track; and the fright of the horses could not therefore have been produced by appellant; nor was it required to ring a bell or sound a whistle while remaining still. We find no material error in the instructions, and because the verdict is against the weight of the evidence, the judgment of the Circuit Court will be reversed and the cause remanded.

F. M. Madison v. Joseph Mangan.

1. **CONTRACTS**—*Construction of.*—Where a person paid a physician the sum of one hundred dollars to cure him of a certain disease on condition that if he failed to effect the cure such person should submit to further treatment, *it was held* that the physician was entitled to retain the amount agreed upon, even though the cure was not effected, if the person refused or neglected to submit to further treatment.

Assumpsit, on a contract for physician's services. Trial in the Circuit Court of Knox County; the Hon. JOHN A. GRAY, Judge, presiding. Verdict and judgment for defendant. Appeal by plaintiff. Heard in this court at the May term, 1898. Reversed with a finding of facts, etc. Opinion filed September 26, 1898.

HAMILTON, GODFREY & SHELTON, attorneys for appellant.

J. E. MALEY and W. E. BYERS, for appellee.

MR. JUSTICE WRIGHT delivered the opinion of the court. Appellant was sued by appellee before a justice of the peace, which suit was removed by appeal to the Circuit

Court. The cause of action was for \$100 for the alleged breach of a contract of warranty to cure the appellee of piles, made by appellant, who is a physician. A trial by jury resulted in a verdict against appellant for \$100, from which he appeals to this court, and assigns for error that the verdict is against the evidence in the case. Other errors are also assigned, but it will be unnecessary to notice them.

Appellant, as a physician, undertook to treat appellee for piles, and for that purpose a contract was entered into by which, for \$100, a warranty was given for the cure of his then present affliction; and in case the disease returned at any future time appellee was to be treated free of additional charge. After operation performed, appellee believed he was cured, and appellant was of the same opinion. Although then not required of him, appellee insisted upon the payment to appellant of the contract sum of \$100, and then returned to his home. The terms of the contract required appellee to return to appellant for further treatment, in case the cure proved to be incomplete. Within thirty days after his return home, appellee notified appellant by letter he did not need to return for further treatment, being at the end of that time cured, as he believed. After the lapse of two years, without notice or application for further treatment to appellant, appellee brought this suit to recover back the \$100 he had paid, claiming he had continued to be and was then afflicted with piles. In view of the whole evidence we think the recovery can not stand.

Appellee should have, under the terms of the contract, about which there is little dispute, applied to appellant for further treatment; when, if appellant refused to treat him, or treated him ineffectually, it may be the suit could be maintained. But there is no claim, founded upon any evidence in the case, that appellee ever offered to submit to further treatment; and we think the verdict against the evidence. This view of the case renders it unnecessary to consider the questions arising upon the admission of evidence, or the instructions to the jury, which have been argued by counsel. Because there is no cause of action, the judgment of the Circuit Court will be reversed.

Peru Plow & Wheel Co. v. Sandwich Enterprise Co.

FINDING OF FACTS TO BE RECITED IN THE FINAL ORDER OF
THE COURT.

The court finds from the evidence, as facts in this case, that appellee failed on his part to perform the contract upon which he has brought suit against appellant, and for that reason he has no right to maintain a suit against appellant for the alleged breach on his part; and we further find that appellant has on his part performed all the terms of his contract that it was possible for him to perform in the absence of performance by appellee.

Peru Plow & Wheel Co. v. Sandwich Enterprise Co.
et al.

1. *EQUITY PRACTICE—Order Sustaining a Demurrer Not Final.*—A bill in equity is not necessarily put out of court by sustaining a demurrer to it. It is only from a decree making a final disposition of a case that an appeal or writ of error lies.

2. *SAME—Final Order After a Demurrer is Sustained.*—A complainant willing to rest his case upon a demurrer must move the court to dismiss the bill, and when that is done, the order of dismissal is final, and appeal or writ of error will lie.

3. *SAME—Order Sustaining a Demurrer Interlocutory.*—In chancery practice an order sustaining a demurrer to a bill is an interlocutory order.

Bill for Equitable Relief.—Trial in the Circuit Court of DeKalb County; the Hon. HENRY B. WILLIS, Judge, presiding. Hearing on demurrer to the bill of complaint. Judgment for defendant. Appeal by complainant. Heard in this court at the May term, 1898. Appeal dismissed. Opinion filed September 26, 1898.

FRED T. BEERS, attorney for appellant.

BOTSFORD, WAYNE & BOTSFORD, attorneys for appellee Sedgwick.

CARNES & DUNTON, attorneys for appellee Crowfoot.

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MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

Appellant filed a bill in the Circuit Court of DeKalb County for equitable relief against the Sandwich Enterprise Company and seven individuals. The Enterprise Company and six of the other defendants were served and filed demurrers to the bill. Appellant entered its motion for a receiver. The demurrers and the motion for a receiver were heard together, pursuant to a stipulation as to the manner in which they should be argued upon written briefs, and the court sustained the demurrers to the bill. Appellant then filed a paper, signed by its solicitor, stating that it elected to stand by its bill, motion and stipulation, and objected to the order sustaining defendant's demurrer, and that it prayed an appeal to the Appellate Court. The record of the court does not show that this paper was presented to the court, but does show complainant afterward, in open court, prayed an appeal to the Appellate Court, which was granted upon its filing bond. The bond recites that it is given upon an appeal from a decree sustaining demurrers to the bill of complaint.

Appellees urge that the above is not an appealable order, and that there is nothing brought before us by the attempted appeal. Appellant insists that by the order in question the case was ended in the court below, and that its appeal was properly taken. In *Fleece v. Russell*, 13 Ill. 31, it was held that a bill in equity is not necessarily put out of court by sustaining a demurrer to it, and that it is only from a decree making a final disposition of a case that an appeal or writ of error lies. In *Knapp v. Marshall*, 26 Ill. 63, where the court sustained a demurrer to a bill, and the complainant sued out a writ of error, the court held that the decision on the demurrer was merely interlocutory; that a complainant, willing to rest his case upon a demurrer, must move the court to dismiss the bill, and when that is done that order is final and appeal or error will lie. That course was pursued by complainant in *Weaver v. Poyer*, 70 Ill. 567, and the court held it proper, so as to obtain a final disposition in the case, in order that complain-

ant might resort to an appeal or writ of error. In *Campbell v. Powers*, 139 Ill. 128, the court below had sustained a demurrer to a bill and granted leave to amend within five days, which was not done. At the next term there was a motion to dismiss the bill and a cross-motion by complainants for leave to amend. The court below held that there had been a final disposition of the case at the former term, and that it was then without jurisdiction to grant said leave. The Supreme Court held that the order sustaining the demurrer was interlocutory only. *Maguire v. Woods*, 33 Ill. App. 638. While there are some expressions to be found in the books to the effect that an order sustaining a demurrer to a bill for want of equity puts an end to the case, yet when such an order is entered complainant has still a clear right to ask leave to amend the bill of complaint, and defendants have no decree for their costs, nor for execution to collect the same; and we think the modern and better practice is to treat the order sustaining the demurrer as interlocutory merely. If complainant elects to abide by its bill it should ask the court to enter such election of record. It will then be the duty of the court to dismiss the bill at the cost of complainant. If the court should doubt the propriety of making such an order, the cases above cited point out a proper course for complainant to pursue if it wishes the action of the court reviewed.

As no final order was entered in the court below, the appeal was prematurely taken, and it will therefore be dismissed and leave given appellant to withdraw its record if it desires.

Chicago, M. & St. P. R. R. Co. v. Edward Smith.

1. WORDS AND PHRASES—"Settle"—*Admissions*.—When a claim is presented to a railroad company, and its claim agent, without questioning its legality, promises to settle, such promise must be held to apply to the claim as presented.

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C., M. & St. P. R. R. Co. v. Smith.

Assumpsit, on a promise to pay the amount of a claim. Trial in the Circuit Court of Jo Daviess County; the Hon. JAMES S. BAUME, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the May term, 1898. Affirmed. Opinion filed September 26, 1898.

GEORGE L. HOFFMAN, attorney for appellant.

D. & T. J. and J. M. SHEEAN, attorneys for appellee.

MR. JUSTICE CRABTREE delivered the opinion of the court. This was an action of assumpsit, brought by appellee against appellant, and which was based upon an alleged promise of appellant to pay appellee the amount of a certain claim presented by him to the railroad company for the damage to, and destruction of property, by a washout on the line of its railroad in Carroll county. This claim had been in the hands of appellant for more than six months, and while it denied any legal liability, no question was ever raised as to the correctness of the account, provided the company was legally bound to pay it. It appears that W. I. Earhart, a claim agent of appellant, apparently acting under authority (which does not seem to be denied), met appellee at Savanna in relation to this claim, and appellee testifies that Earhart then promised that if he, appellee, would discourage the prosecution of other claims against the company, arising out of the same washout, that appellant would "settle" with appellee. It is true there is a conflict in the testimony as to what was said between Earhart and appellee at Savanna, but the jury, who saw the witnesses and heard them testify, have found specially that Earhart, as agent, on behalf of appellant, agreed to pay the amount of appellee's claim, and also found specially that he had authority from appellant to agree to pay the claim. In addition the jury also found a general verdict in favor of appellee for \$266.50, which was the amount of his claim as presented to the company. It is not denied that appellee tried to discourage the prosecution of the other claims against the company, and in this respect fulfilled the condition upon which he says the promise was made.

Belvidere Gas Light & Fuel Co. v. Wayland.

Two questions are presented for determination, viz.: First, was the promise made as claimed by appellee; second, if such promise was made, did it mean payment of appellee's claim as presented, and was it sufficiently definite to support an action. Upon the first question we are not disposed to interfere with the finding of the jury upon the evidence appearing in the record. We can not say the verdict is not supported by the evidence. If the jury believed the statements of appellee, as they had the right to do, then the promise was made.

Upon the second question we are of the opinion, based upon the authorities, that a promise to "settle," under the circumstances, must be construed as a promise to pay the claim which appellee had presented and was insisting upon. No question had been raised as to the correctness of the bill, although, as we have seen, it had been in the hands of appellant for some six months. The only controversy had been one of legal liability. Under such circumstances a promise to "settle," regarded as a promise to pay, must be held to apply to the claim as presented. 22 Am. and Eng. Ency. of Law 489, note 4; *Pinkerton v. Bailey*, 8 Wend. 600; *Stillwell v. Coope*, 4 Denio, 225.

We find no serious errors in the rulings of the court, and the judgment, appearing to be just, will be affirmed.

The Belvidere Gas Light & Fuel Co. v. W. A. Wayland.

1. JUDGMENTS—*Based upon Verdicts Unsupported by the Evidence.*—A judgment based upon a verdict which is not supported by the evidence will be reversed.

2. RECOUPMENT—*Damages Caused by Negligence of Contractors.*—In a suit upon a contract to repair a gas tank for a fixed price the defendant has a right to recoup against such contract price the money necessarily expended in repairing an injury to the tank caused by the negligence of the contractors while it was being repaired.

Assumpsit, for work, labor, etc. Trial in the Circuit Court of Boone County; the Hon. CHARLES E. FULLER, Judge, presiding. Verdict and

judgment for plaintiff. Appeal by defendant. Heard in this court at the May term, 1898. Reversed and remanded. Opinion filed September 26, 1898.

STATEMENT.

Appellant desired to have its gas holder, a large steel tank at its works at Belvidere, raised and held suspended for a considerable time while it repaired and rebuilt the mason work underneath. It had eight screws and eight chains suitable to be used to help hold it up. Appellee lived at Rockford and was in the business of raising and moving heavy buildings and machinery. He inspected the screws and chains and concluded they were sufficient for the purpose. He made the following written proposition to appellant: "I will raise the gas holder and put the same back in the holder basin in first class condition, furnish all material and labor, except the screws and chains which you now have, for the sum of \$175." This proposition was accepted by appellant in writing. Appellee began work about May 20, 1897, and raised the holder and left it suspended, and supported by timbers underneath and by screws and chains on the side. On June 17th the gas company wrote him that all was ready for him to lower the holder. He received the letter on June 18th. On June 19th the holder fell during a storm of wind and rain. Appellee arrived on June 21st. He did certain things toward restoring the holder to its proper place and letting it down. Appellant made certain repairs. It paid appellee \$125, and spent \$67.85 in repairing the injury done by the fall (exclusive of taking the dents out of the holder, which appellant agreed to do at its own expense). The proof was it would still cost \$100 more to make the holder as good as it was before it fell. Appellant claimed appellee was responsible for the injury, and refused to pay more under the contract. Appellee brought suit for the \$50 not paid on the contract, and recovered verdict and judgment therefor.

ROBERT W. WRIGHT, attorney for appellant.

WM. L. PIERCE and CHARLES ROACH, attorneys for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

We are of opinion the verdict is not supported by the evidence.

First. The métal top of the tank sank about two feet below its outer edges by its own weight, thus making a large basin on top. Three weeks before the tank fell the mechanical superintendent of the gas company told appellee he ought to put a prop under the center of the holder to raise and sustain the top so it would not hold water, for if it should rain the water which would be detained in the top as it then was, would cast such extra weight on the screws and timbers that they would be liable not to support the holder with such added weight. Appellee promised to put a prop underneath, but did not do so. His excuse was the work could not be completed with such a prop in position. The proofs showed that nearly all the work could have been done with such a prop underneath. It was the weight of the water which collected in the basin on the top of the holder during the storm which caused it to fall.

Second. Appellee did not use enough timbers underneath for support. The timbers he did use had holes in them. He used a long timber with no supports except at the ends. It became badly sprung by the weight resting upon it, and appellee was told of it and his attention called to the necessity of more supports under this timber. He did not supply the defects. The long timber broke, and the other timbers broke where the holes were, and the tank fell. Appellee used much less supporting timber than he proposed to use when he took the contract.

Third. Eight hooks and chains were furnished him to use upon the outside to assist in holding the tank in place. He only used six. They gave way and broke with the weight of the water. He should have used them all, and their added strength might have prevented the accident.

Fourth. We are of opinion the evidence clearly shows the tank fell because appellee did not properly support it, and did not so support the metal top as to leave no basin in

which water could collect during a rain. Although the contract did not in express terms say appellee was to keep the tank supported while the repairs were being made, it is plain all parties so understood and interpreted it. Appellant had a right to recoup against the contract price the money it necessarily expended in repairing the injury. Appellee claimed that after the tank fell he made a new contract with the gas company by which he was to make certain repairs and was then to be paid the full contract price, and that he made the repairs as agreed. His own testimony as to the making of such new contract is very weak, and the clear preponderance of the evidence is against it.

The judgment of the court below will be reversed and the cause remanded for a new trial.

John Jones v. The People of the State of Illinois, for the use of Anna Burlet.

1. **BASTARDY**.—*Satisfaction of Judgment in.*—The mother of a bastard child has no power to satisfy a judgment rendered in proceedings against the putative father for less sum than the amount of such judgment without the consent of the county judge. R. S., 1897, p. 206, Sec. 18.

Bastardy Proceedings.—Motion to vacate satisfaction of judgment. Appeal from the County Court of Peoria County; the Hon. ROBERT H. LOVETT, Judge, presiding. Heard in this court at the May term, 1898. Affirmed. Opinion filed September 26, 1898.

ELLWOOD & MEEK, attorneys for appellant.

JOHN DAILY, State's Attorney, and **Covey & Covey**, attorneys for appellee.

MR. JUSTICE CRABTREE delivered the opinion of the court. Anton Thiers was arrested on a charge of bastardy on

Jones v. The People.

the complaint of Anna Burlet. At the May term, 1896, of the County Court of Peoria County, he was tried, found guilty, and a judgment rendered against him according to the usual practice in such cases for \$550.

From this judgment he prayed and was granted an appeal to the Circuit Court of Peoria County, upon which appeal he gave bond in the sum of \$700, with appellant and one Samuel Block as sureties thereon. At the October term, 1896, of the Circuit Court of Peoria County, this appeal was dismissed for want of jurisdiction. Suit was brought upon the appeal bond in the said County Court, and on September 18, 1897, a jury being waived, the cause was tried by the court and judgment rendered against the defendant therein, including appellant, for \$700 debt and \$160.20 damages, the judgment to be satisfied on payment of the damages, and it being expressed that such judgment was for the use of Anna Burlet.

From this judgment appellant prayed an appeal to this court, but before the appeal was entirely perfected, he made a settlement with said Anna Burlet, which was in writing, and whereby she agreed to accept and receive the sum of \$125 in full satisfaction of the judgment. The money was paid by appellant, and said Anna Burlet assumed to execute a full satisfaction of the judgment and release appellant from all further liability. This was done October 11, 1897. On March 21, 1898, the state's attorney, on behalf of the people, entered a motion to set aside and vacate the satisfaction of said judgment entered on October 11, 1897, on the ground that the attempted satisfaction of said judgment and release of appellant was made by the mother of the bastard child, said Anna Burlet, for a less consideration than \$400 and without the consent, written or otherwise, of the county judge. On a hearing of this motion by the County Court it was sustained, the satisfaction of the judgment was vacated, a credit of \$125, and also of \$5.80 costs paid by appellant, was allowed thereon, and execution awarded for the balance of the judgment remaining unpaid. From this order appellant prosecutes his appeal to this court.

There can be no question that the judgment which appellant endeavored to settle with Anna Burlet was valid and binding upon him until reversed, and the only question in the case is whether said Anna Burlet had the power to satisfy the same for \$125. By the 18th section of the bastardy act, it is provided that, "the mother of a bastard child, before or after its birth, may release the reputed father of such child from all legal liability on account of such bastardy, upon such terms as may be consented to in writing by the judge of the County Court of the county in which such mother resides; provided, a release obtained from such mother, in consideration of a payment to her of a sum of money less than four hundred dollars (\$400), in the absence of the written consent of the county judge, shall not be a bar to a suit for bastardy against such father; but if, after such release is obtained, suit be instituted against such father and the issue be found against him, he shall be entitled to a set-off for the amount so paid, and it shall be credited to him as of the first payment or payments. And, provided further, that such father may compromise all his legal liability on account of such bastard child with the mother thereof, without the written consent of the county judge, by paying to her any sum not less than \$400." Rev. Stat. 1897, p. 205, Sec. 18.

While this case is not strictly within the letter of the statute referred to, we are of the opinion that within its spirit the mother had no power to make the settlement and satisfy the judgment as she attempted to do. It was the manifest intention of the legislature to prohibit the settlement of a bastardy proceeding for a less sum than \$400, in order that the interests of the people of the State should be protected to at least that extent. *Waterloo v. The People*, 170 Ill. 488.

We think the order of the court in vacating the satisfaction of the judgment was right, and it will be affirmed.

First National Bank v. Peoria Watch Company et al.

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1. CORPORATION—*Rights of—Simple Contract Creditors—Delinquent Subscribers.*—Under section 25 of the act concerning corporations, a simple contract creditor may file his bill to reach unpaid subscriptions for stock, so as to enforce the liability against delinquent subscribers, without having first reduced his claim to a judgment.

Creditor's Bill.—Trial in the Circuit Court of Peoria County; the Hon. THOMAS M. SHAW, Judge, presiding. Hearing and judgment for defendant, on demurrer. Appeal by plaintiff. Heard in this court at the May term, 1898. Reversed and remanded. Opinion filed September 26, 1898.

ARTHUR KEITHLEY, attorney for appellant.

JACK & TICHENOR, attorneys for appellees.

MR. JUSTICE CROSBY delivered the opinion of the court.

This was a bill in equity, filed by appellant against the Peoria Watch Company and certain subscribers to the capital stock of said company, in the nature of a creditor's bill, for the purpose of enforcing payment of a claim held by the appellant against the company. Demurrers having been sustained to the original bill, and to the same as amended on two different occasions, appellant filed an amended bill, which is the one now before us, and a demurrer being sustained thereto, appellant brings the case to this court.

The amended bill shows that appellant is a contract creditor of said Peoria Watch Company to the amount of \$10,607.41; that said company is insolvent; that it was organized as a corporation in 1885, with a capital stock of \$150,000; that various calls from time to time, amounting to seventy per cent of the entire amount, were made by the board of directors upon all the stockholders of the company; and that a further assessment of ten per cent was made, payable in October, 1886, a ninth assessment of ten per cent,

payable in November, 1886, and the last one, also of ten per cent, payable in December, 1886; that certain of the stockholders had never paid anything upon their stock; that on March 18, 1891, the company being indebted to appellant bank, gave it a note for the sum of \$10,607.41, with eight per cent interest thereon, and that no part of said note has been paid; that shortly thereafter said company became insolvent and ceased doing business, disorganized, and to all intents and purposes has not since then had any corporate existence. That it has no property of any kind or character, except delinquent subscriptions to its capital stock, and that appellant is the only creditor. Appellant's claim has never been reduced to judgment. The prayer of the bill is that the delinquent stockholders be decreed to pay the balance due upon their subscriptions, and that a receiver may be appointed and the corporation wound up, etc. All the stockholders are made parties defendant with the appellee company, except C. R. Wheeler, who joined with appellant as a complainant in this amended bill. It is further averred that four of the stockholders are indebted to the amount of thirty per cent of their subscriptions for stock, to wit: Cole, Gish, Truesdale and Brodman. That all other stockholders have paid their subscriptions in full, except Eugene F. Baldwin and Lem Wiley, and that they are insolvent.

Various grounds of demurrer to the bill were set up, but the principal points relied on here are, that there was a complete remedy at law; that appellant's claim had not been reduced to judgment; also relying upon the statute of limitations and *laches* appearing upon the face of the bill.

We hold that under section 25 of the act on corporations, a simple contract creditor may file his bill to reach unpaid subscriptions for stock, so as to enforce the liability against delinquent subscribers without having first reduced his claim to a judgment. *Woolverton v. Taylor*, 43 Ill. App. 424; *Buda Foundry Co. v. Columbian Celebration Co.*, 55 Id. 391; *Northam & Co. v. Atherton*, 67 Id. 230.

City of Rockford v. Rannie.

The bill shows that appellant is the only creditor of the insolvent corporation, and the only assets of the latter are unpaid subscriptions to its capital stock.

The bill appears to have been filed in apt time, and the questions of *laches* and the statute of limitations need not be discussed. We think the demurrer to the bill should have been overruled and the decree will therefore be reversed and the cause remanded, with directions to the Circuit Court to proceed in accordance with this opinion.

Decree reversed and cause remanded.

City of Rockford v. Christina Rannie.

1. **ERRORS**—*Not Argued, Abandoned*.—Errors assigned but not argued must be considered as abandoned.

2. **ORDINARY CARE**—*What Is, etc.*—A woman on her way to her home with her daughter, who in passing along the sidewalk, started to go on one side of an accumulation of snow and ice, but found the snow too deep, and then stepped upon the mass of snow and ice in the middle of the walk, and fell, receiving the injuries complained of, can not be said to be guilty of negligence in attempting to pass along the walk, the condition of which she had not previously known.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Winnebago County; the Hon. JOHN C. GARVER, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the May term, 1898. Affirmed. Opinion filed September 26, 1898.

M. M. CORBETT, city attorney, for appellant; A. H. FROST of counsel.

C. O. CARBAUGH and ANDREWS & VAN TASSEL, attorneys for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

This is a suit brought by appellee against appellant to recover damages for injuries appellee claims she received

from falling upon a sidewalk upon the north side of Elm street in the city of Rockford. There was a trial by jury upon issues joined, and verdict and judgment for plaintiff for \$750, from which judgment the city appeals. The assignments of error question the rulings of the court, but these are not argued and therefore waived. Appellee sustained a fracture of the right thigh bone, and she is left with a shortened leg; her heel lacks about two inches of coming to the floor when she stands erect; and she has not the same ability to use the leg as before the injury. It is assigned for error that the damages are excessive, but that assignment also is not argued. Appellant's only contention here is that under the law the facts proved do not give appellee a cause of action.

We find that the clear preponderance of the evidence is that a heavy snow fell in Rockford on January 23, 1897; that the city authorities soon thereafter ran a snow plow over this sidewalk; that at the point where appellee afterward fell the snow plow tilted or lifted over the snow upon the north side and swerved to one side, leaving snow on the north side of the walk about eighteen inches deep, and sloping down to three or five inches deep near the south side of the walk; that the top of this body of snow alternately thawed in the daytime by reason of its slope toward the sun, and froze at night by reason of the cold weather then prevailing; that it was trodden upon in the daytime enough so that it became rough and uneven; and that this condition continued for nearly a week before the injury without being remedied by the city. In the evening of January 30th, about a quarter after nine o'clock, appellee was on her way to her home with her daughter and passing along said walk. She started to go on the north side of this accumulation, but found the snow too deep, and then stepped upon it in the middle of the walk, and stepped upon this icy, rough mass of frozen snow and fell and received the injuries complained of. The city had had ample time to restore the walk to a proper condition for travel. We can not say appellee was guilty of negligence in attempting

Erie City Iron Works v. Dempsey.

to pass along this walk, the condition of which she had not known till that moment. We think, under the facts stated, the recovery was proper. *City of Virginia v. Plummer*, 65 Ill. App. 419. The judgment will therefore be affirmed.

Erie City Iron Works v. Andrew Dempsey.

1. **WARRANTIES**—*Burden of Proof Under*.—The burden of showing that an article does not fulfill a warranty is upon the party asserting it.

2. **REBUTTER**—*What is Proper as*.—After letting in evidence on the part of the defendant of a defense, it is error in the court to refuse to allow witnesses called in rebuttal by the plaintiff to testify to the contrary.

3. **EVIDENCE**—*Comparisons in Suits upon Warranties*.—In an action upon a warranty it is error to allow a comparison of the article warranted, with one of the same kind previously used by the party.

Assumpsit, to recover the contract price of a steam engine. Trial in the Circuit Court of Du Page County; the Hon. CHARLES A. BISHOP, Judge, presiding. Verdict and judgment for plaintiff. Appeal by plaintiff. Heard in this court at the May term, 1898. Reversed and remanded. Opinion filed September 26, 1898.

J. F. SNYDER, attorney for appellant.

BOTSFORD, WAYNE & BOTSFORD, attorneys for appellee.

MR. JUSTICE CRABTREE delivered the opinion of the court.

This suit was brought by appellant to recover the sum of \$1,040, which was the contract price of an "Erie City Iron Works High Speed Corliss Engine," and the further sum of \$28.75 for grate-bars, all of which had been sold and delivered by appellant to appellee. The declaration consisted of common counts, to which the defendant pleaded the general issue, and also a plea of *non est factum*. The cause was tried by a jury which rendered a verdict in favor of appellant for \$527.75; the court entered judgment thereon after overruling appellant's motion for a new trial. Complain-

ing of the insufficiency of the damages, appellant brings the cause to this court and seeks a reversal for various errors assigned upon the record.

Appellee was engaged in operating an electric light plant at West Chicago, Illinois, for several years prior to November 17, 1896, using a Phoenix engine, and on that date he entered into a written contract with appellant for the purchase of one of its engines, said contract being as follows:

“Nov. 17, 1896.

MR. A. DEMPSEY, Turner, Ill.

DEAR SIR:—For the sum of ten hundred and forty (\$1,040) dollars, we propose to furnish you the following described engine and parts F. O. B. Turner, Ill.

The engine shall be one of our 12-inch by 18-inch high speed Corliss Left Hand Automatic Engines, with a nominal rating of 95 horse-power, 45 pounds M. E. P., cutting off one-quarter and making two hundred and ten revolutions.

The engine shall have a driving pulley 84 inches by 12½ inches; weight about 3,500 pounds; diameter of steam pipe 5 inches; diameter of exhaust, 6 inches; diameter of shaft, 7 inches; diameter of crank-pin, 4x4½ inches; length of journal, 18 inches. With this engine we propose to furnish you a full set of trimmings, consisting of: Large sight-feed lubricator; complete set of oiling devices; one set of wrenches; valve and drip pipes from cylinder and steam chest; foundation bolts and washers; templet of foundation of engine. Weight of all this will be about 15,000 pounds. This engine shall be of the best quality and workmanship and will be capable of developing its maximum horse-power without undue heating.

We guarantee this engine to equal in efficiency any Corliss engine in the market, and to not vary more than two per cent between no load and full load.

Yours truly,

ERIE CITY IRON WORKS, F. A. G.

Accepted. A. DEMPSEY.”

The engine was delivered and set up in January, 1897,

Erie City Iron Works v. Dempsey.

and run by appellee until about one week before the trial of this cause, when he took it out and ceased to operate it.

This suit was commenced on September 6, 1897, so it appears that appellee ran and operated the engine up to the date on which he was sued for the contract price, and until one week before the trial of this suit.

The defense relied upon was, that the engine delivered was not according to the contract, and did not comply with the warranty therein contained.

After the engine was set up and put in operation, complaints were made from time to time by appellee as to its efficiency, and men were sent by appellant to put it in proper order. In July, 1897, appellant wrote appellee a letter asking him if the engine was then satisfactory, but to this he made no reply, and it does not appear that he made any further complaints after that time.

The burden of showing that the engine did not fulfill the warranty was upon appellee, and we do not think his defense was sustained by a preponderance of the evidence. In our opinion appellant has not had a fair trial. After letting in evidence on the part of appellee that a releasing gear was one of the distinguishing features of a Corliss engine, the court refused to allow the witness Foster, called in rebuttal by appellant, to testify to the contrary thereof. We think this was wrong, and unfair to appellant.

Again, the court permitted the introduction of the indicator cards taken by Hart, a witness for appellee, but refused testimony offered by appellant to show that the cards can be made to show, by an engineer, what he wants them to show. These rulings, we think, were unfair to appellant, and must have been highly prejudicial to his case. We are also of the opinion it was error to allow a comparison of the engine sold by appellant with the Phoenix engine previously used by appellee. The trial court seems to have been of the opinion this evidence was ruled out, but the record does not show it.

We are of the opinion the verdict is not warranted by the evidence, and the court should have granted the motion for a new trial.

Appellee's sixth instruction should not have been given. The only guaranty in the contract was that the engine sold should equal in efficiency any Corliiss engine in the market. Nothing whatever was said about economy, yet by this instruction the jury were told that by this guaranty the plaintiff was required to furnish to the defendant an engine which would do as efficient and *economical* service as any Corliiss engine in the market. The question for the decision of the jury was, did appellant deliver to appellee the kind of an engine which it sold him, and not whether it was an economical engine. By the instruction the jury would naturally conclude that if the engine in question were not an economical one, then the warranty was not fulfilled. Under the evidence we think it was error to give this instruction.

For the reasons given the judgment will be reversed and the cause remanded for a new trial.

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**William Lossman and Charles Gropp, Partners under the
Firm Name of Lossman & Gropp, v. Charles
Knights and Fidelia Knights.**

1. **INTOXICATING LIQUORS**—*Right of the Father to Recover for the Sale of, to a Son.*—The fact that under the law he might be entitled to the son's wages or earnings does not, under the evidence in this case, give the father a right of recovery.

2. **SAME**—*Parents Living Separate and Apart.*—Where a son is living with his mother, she being divorced from the father, the right of recovery, if any, under the proofs in this case, must be in the mother alone.

3. **SAME**—*Joint Recovery by Husband and Wife Living Apart.*—A joint recovery by husband and wife, divorced and living apart, can not be sustained.

4. **DRAM SHOP ACT**—An action under the dram shop act for the recovery of damages is a civil and not a criminal prosecution.

Trepass on the Case, for damages resulting from the sale of intoxicating liquors. Trial in the Circuit Court of DeKalb County; the Hon. HENRY B. WILLIS, Judge, presiding. Verdict and judgment for plaintiffs.

Lossman v. Knights.

Appeal by defendant. Heard in this court at the May term, 1898.
Reversed and remanded. Opinion filed September 26, 1898.

M. R. HARRIS and W. C. KELLUM, attorneys for appellants.

JONES & ROGERS, attorneys for appellees.

MR. JUSTICE CRABTREE delivered the opinion of the court.

This was an action on the case under the dram shop law, brought by appellees against appellants, to recover damages for an alleged injury to the means of support of the former, in consequence of the intoxication of their minor son, Howard Knights, produced, as it is claimed, by sales of intoxicating liquors to him by appellants, who are dram shop keepers in the city of Sycamore.

The evidence shows that appellees were formerly husband and wife, parents of Howard Knights, and were divorced at the June term, 1894, of the DeKalb County Circuit Court, the decree, however, making no disposition as to the custody of the minor child. The young man became of age in February, 1897.

It appears from the record that the suit was originally commenced in the name of the father, Charles Knights, for the use of the mother, Fidelia Knights, and a declaration filed accordingly, to which a general demurrer was interposed and sustained. On leave granted, an amended declaration was filed, naming both appellees as plaintiffs, but no amendment was made of the praecipe and summons. A demurrer to the amended declaration having been overruled, appellants filed the general issue, and upon a trial by jury, there was a verdict in favor of appellees jointly, for \$750.

Motions for a new trial and in arrest of judgment were entered and overruled and judgment was entered on the verdict. Appellants saved the proper exceptions and bring the case to this court by appeal. Various errors are assigned upon the record.

The first point argued is, that the motion in arrest of judgment should have been sustained for the reason, as claimed, that there is a misjoinder of parties, it being

insisted that only the father of Howard Knights was entitled to his earnings or was liable for his support, and that as a consequence he only could maintain this suit. We are not prepared to hold so strongly as this, under the peculiar provisions of the dram shop law. We think there might be cases where a mother, living separate and apart from the father, and being supported by a minor child living with her, might have a right of action against a dram shop keeper for injury to her means of support caused by sales of intoxicating liquor to the minor. We do not, however, feel called upon to determine that question in this case. The judgment must be reversed upon other grounds. As the record stood at the time the demurrer to the amended declaration was passed upon, we think the demurrer should have been sustained; but by pleading over, the demurrer was waived, and we are disposed to hold the declaration good after verdict.

But the proofs do not sustain the declaration. Appellees, though formerly husband and wife, had, for more than seven years before this suit was commenced, and during all the time it is claimed appellants sold intoxicating liquors to their minor son, lived separate and apart, and there is not a particle of proof the means of support of Charles Knights were ever, to the slightest degree, affected or injured by the intoxication of Howard, and no reason is perceived why he should be permitted to recover. The fact that under the law he might be entitled to the son's wages or earnings, does not, in our opinion, under the evidence in this case, give the father a right of recovery. The proofs show the son lived with the mother, and while the evidence is slight and unsatisfactory concerning his contribution to her means of support, it can not be said there was no evidence to go to the jury upon that point. The recovery, therefore, if any be had, must be by the mother alone, and under the proofs in this case a joint recovery by appellees can not be sustained. The allegations of the amended declaration are not sustained by the proofs and a new trial should have been granted.

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The first instruction should not have been given. The action is not criminal in its nature, and such an instruction was calculated to mislead the jury.

The fifth instruction to some extent seems to assume that the sales of the intoxicating liquors to the minor caused him to squander his wages. This was faulty. Instructions should not assume facts which are to be found by the jury. If any damages are to be recovered, they must be for injury to the means of support, and not merely for squandering wages. While we would not reverse for this instruction alone, if the record were otherwise free from error, we think it should not have been given in its present form.

For the reasons given, the judgment will be reversed and the cause remanded for a new trial.

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Insurance Company of the State of Illinois v. Manchester Fire Assurance Co.

1. **TENDER**—*As an Admission of the Amount Due.*—The tender of an amount is evidence tending to show an admission of a sum due to the person to whom the tender is made.

2. **EVIDENCE**—*Tending to Show an Agent's Authority, Competent.*—When a party has dealings with another as agent of a third party, and the proof upon the question of the agent's authority is conflicting, evidence tending to show that the act in question was done by such person under proper authority, is competent.

Assumpsit, on a contract of reinsurance. Trial in the Circuit Court of Du Page county; the Hon. HENRY B. WILLIS, Judge, presiding. Verdict and judgment for defendant. Error by plaintiff. Heard in this court at the May term, 1898. Reversed and remanded. Opinion filed September 26, 1898.

STATEMENT.

Appellee had issued two policies of insurance against fire upon grain in Pacific elevators A and B, Chicago. The elevators and contents were destroyed by fire. Appellee paid its insurance and then brought this suit against appel-

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lant on an alleged contract by appellant to reinsure appellee against said risks to the amount of \$2,500 on each. It was stipulated that all proof should be admitted which could be introduced under proper declaration, pleas and replications. There was a trial by jury. At the close of all the evidence, on motion of appellee, the court instructed the jury to find for appellee and assess its damages at \$3,043. Such verdict was rendered, a motion for a new trial interposed by appellant and denied, a judgment on the verdict entered, and this is an appeal therefrom.

The proofs show that the home office of appellant was at Rockford, Illinois; that Nichols & Newberry were agents for appellant in Chicago; and that appellee applied to said agents over the telephone to procure such reinsurance by appellant. Said agents, after examining their books, replied they would reinsure. They were in the habit of making to appellant two reports each week, which they called daily reports. They duly reported this insurance to the home office in the first daily report after agreeing to take the risk. The next morning after said report was mailed, the secretary of appellant, at Rockford, called up Newberry by telephone and gave directions to immediately cancel the reinsurance above referred to. Without leaving the telephone, Newberry called up the general agency of appellee in Chicago, and called for Shepard, its local manager, who had directly in charge the matter of reinsurance of appellee's Cook county business. Newberry received a reply that Shepard was out. During the afternoon he again called up the same office by telephone, and again asked for Shepard, and was again told he was not in. He recognized the voice as that of McCabe, an assistant of Shepard in that department, and directed him to tell Shepard that he had been ordered to cancel the insurance in question, and must immediately call off the lines; that he wanted it attended to that night as he could not let it run over. This notice was about a week before the fire. No premium had been paid. No writing had passed.

WORKS & HYER, attorneys for appellant.

E. H. GARY and THOMAS BATES, attorneys for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

First. It was proved that after the fire appellee tendered appellant \$80 for the premium for said reinsurance and appellant refused to take the money. The offer was certainly evidence tending to show an admission by appellee that there was that sum due to appellant for the premium for said reinsurance. Under the stipulation no plea was necessary to enable appellant to set off that sum against appellee's demand. The instruction, verdict and judgment each ignored this evidence of a set-off, and they are excessive in amount, as the sum named therein was the amount which would be due from appellant upon such reinsurance, without deducting the premium.

Second. The instruction given by the court was equivalent to a decision, either that the contract could not be canceled by notice, or else that notice to McCabe was not notice to Shepard, appellee's superintendent and general manager at Chicago. There was evidence tending to show that the practice prevailed in the insurance business in Chicago, to follow oral insurance by a written certificate recognizing it, and that oral insurance was subject to cancellation by notice till such certificate had been issued. No such certificate was issued in this case. There was also evidence tending to show that McCabe had authority to receive notices of cancellation by telephone for Shepard in appellee's business. Whether there was a cancellation of this reinsurance by the notice to McCabe, was a question of fact, to be decided by the jury under proper instructions.

Third. There was evidence tending to show Nichols & Newberry were also agents for appellee, and other evidence tending to show that they had only a restricted authority to act for appellee. In that state of the evidence appellant offered to prove by Nichols that said firm at the time in controversy were agents of appellee and authorized to issue policies for them and to receive notices of cancellation of

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policies, and that they did in fact issue policies and act as agents to that extent for appellee. The court sustained an objection by appellee to the offered evidence, and appellant excepted, to the ruling. In view of the proof that appellant's secretary, the morning after the reinsurance was reported, telephoned Nichols & Newberry to immediately cancel said insurance, it was material to know to what extent Nichols & Newberry represented appellee, so as to enable the jury to decide under proper instructions whether that notice to Nichols & Newberry in and of itself effected a cancellation of the insurance. This evidence was material for another reason. Defendant claimed that Nichols & Newberry were agents for both parties and therefore they could not make a binding contract for one of said parties to insure the other, but to make the insurance binding it must be ratified by the home office of appellant; and as appellant at once refused to carry the risk a contract of insurance was not effected. *Hartford Fire Insurance Company v. McKenzie*, 70 Ill. App. 615. Appellant had a right to make the proof offered in order to enable it to raise the question whether a contract of reinsurance had in fact been closed. It was error to refuse to admit the evidence.

Fourth. There was evidence tending to show that a custom prevailed in the insurance business in Chicago as to the manner of taking, continuing and canceling oral insurance; and also evidence tending to show appellant and appellee had dealt with each other in a different manner for some months before the fire. Whether there was such a custom, and whether the parties made this contract for oral insurance with reference to said custom, or under a different course of dealing established between themselves, were questions of fact which the court was not warranted in taking out of the hands of the jury.

Fifth. It was a disputed question, under the proof, whether, by the custom of the business prevailing in Chicago, oral insurance was good for more than ten days if not within that time followed by some writing. This oral insurance was effected October 13th, and the fire occurred

Higinbotham v. Chicago Title & Trust Co.

October 26th. The court should not have withdrawn that question from the jury.

The judgment will be reversed and the cause remanded for a new trial.

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**Harlow N. Higinbotham v. Chicago Title & Trust Co.,
Assignee.**

1. **VOLUNTARY ASSIGNMENTS—Order Discontinuing Proceedings Not Void Because Prematurely Entered.**—An order discontinuing assignment proceedings entered by the County Court under Sec. 15 of the act concerning voluntary assignments (Hurd's Statutes, 1898, page 174), is not void merely because made before the expiration of three months allowed by the statute to creditors to present their claims.

2. **SAME—County Courts Administer Both Law and Equity.**—In proceedings under the act concerning voluntary assignments, unless some equitable grounds demand the vacation of an order discontinuing the proceedings entered before the expiration of the time allowed for creditors to file their claims, it will not be done.

Voluntary Assignments.—Petition to set aside an order discontinuing proceedings. Entered by the County Court of Lake County; the Hon. DEWITT L. JONES, Judge, presiding. Hearing and petition denied. Appeal by petitioners. Heard in this court at the May term, 1898. Affirmed. Opinion filed September 26, 1898.

CLARKE & CLARKE, attorneys for appellant.

SMOOT & EYER, attorneys for the Chicago Title & Trust Co., assignee and appellee.

WHITNEY & UPTON, attorneys for Isaac Goldberg, assignor and appellee.

MR. JUSTICE WRIGHT delivered the opinion of the court.

Appellant and others filed in the County Court, November 6, 1897, their petition to set aside the order of the court previously entered, December 1, 1896, discontinuing the assignment proceedings commenced in that court October

13, 1896, by the assignment of Isaac Goldberg as insolvent, to the appellee as assignee. The court denied the prayer of the petition, from which order appellant prosecutes this appeal.

The section of the statute conferring authority to make orders like the one of which complaint is here made is as follows:

"Sec. 15. All proceedings under the act of which this (section) is amendatory may be discontinued upon the assent in writing of such debtor, and a majority of his creditors, in number and amount; and in such case all parties shall be remitted to the same rights and duties existing at the date of the assignment except so far as such estate shall have already been administered and disposed of; and the court shall have power to make all needful orders to carry the foregoing provisions into effect."

The only question made here by counsel for appellant, in their brief and argument, as we understand them, is, that the order of discontinuance, having been made before the expiration of three months allowed by statute to creditors to present their claims, is for that reason void for the want of the jurisdiction of the court to make it.

It was not claimed by appellant in his petition to the County Court, nor is it here, that a majority of the creditors of Isaac Goldberg did not in fact assent in writing to the order of discontinuance; and the question argued, that the County Court had no authority, before the expiration of three months, to order the discontinuance of the proceedings, does not therefore necessarily arise for decision. If in fact a majority of the creditors, in number and amount, of Isaac Goldberg, have assented in writing to the discontinuance—and in the absence of averment or proof to the contrary it must be so considered—then, although the order may have been prematurely entered, still it did appellant no harm, for it would have been proper to have made it at a later time, even at the time his petition was presented and denied, and with no other effect, as regards the rights of appellant than the order then in force. In proceedings

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like this the court administers both law and equity; and unless some equitable grounds demand the vacation of the order in question it will not be done. It has been held in cases of confessed judgments that they will not be set aside unless some equitable defense exists against the debt for which they were rendered, although void when entered. *Cassem v. Brown*, 74 Ill. App. 346, and cases cited. The same principle is applicable here.

The order of the County Court will be affirmed.

Frank Mead, Adm'r, v. Margaret Stegall.

1. *CONTRACTS—Parties Capable of Contracting.*—As a general proposition, in order to make a valid contract, there must be competent parties, capable of contracting, and whose minds must meet upon the terms of the agreement.

2. *SAME—Of Infants and Lunatics, Voidable.*—Contracts of infants and lunatics are voidable only and not absolutely void. They are capable of ratification by the incompetent person when the disability is removed.

3. *SAME—Questions of Competency—By Whom Raised.*—The question of competency can be raised only by the party himself, or his legal representatives, and can not be availed of by the other party to the contract so as to relieve himself from its performance.

Proceedings in Probate.—Trial in the Circuit Court of Knox County; the Hon. JOHN A. GRAY, Judge, presiding. Verdict and judgment for claimant. Appeal by the administrator. Heard in this court at the May term, 1898. Reversed and remanded. Opinion filed September 26, 1898.

GEO. SHUMWAY and J. T. WASSON, attorneys for appellant.

FLETCHER CARNEY and C. C. CRAIG, attorneys for heirs of Jas. H. Dew, deceased.

A deed or contract made by an idiot, or by a person of weak mind, is like the deed or contract of an infant, not void but voidable only. *Burnham et al. v. Kidwell*, 113 Ill. 425; *Blackstone's Com.*, Book 2, Chap. 19, p. 291; *Kent* (10th Ed.), Vol. 2, page 607, star page 451.

When a deed or a contract is not void but voidable only, as, for instance, the contract of an idiot or an infant, then the party having the ability to contract can not take advantage of the disability of the other party and avoid the contract. It can only be avoided by the idiot or his legal representatives. The reason courts hold such contracts voidable only, is so that persons having ability can not repudiate. It would allow a person to take advantage of his own wrong. Kent (10th Ed.), Vol. 2, pp. 268-270, star page 236; *Cole v. Pennoyer*, 14 Ill. 158; R. S., Chap. 86, Sections 14, 15; *Ferguson v. Sutphen*, 3 Gilm. (Ill.) 547, 573.

As stated by Chancellor Kent, "If their contracts were absolutely void it would follow as a consequence that the contract could have no effect and the party contracting with the infant would be equally discharged. Kent, Com. (10th Ed.), Vol. 2, p. 268, star p. 236.

The statute of this State makes a contract made with an idiot or distracted person, after so found by a jury, void as to the idiot or distracted person, but provides that "the person making such contract with such idiot, lunatic, distracted person or spendthrift, shall be bound thereby," and that contracts made with an idiot or distracted person before such finding may be avoided, except in favor of the person fraudulently making the same." R. S., Chap. 86, Sections 14 and 15.

WILLIAMS, LAWRENCE & WELSH, attorneys for appellee.

MR. JUSTICE CRABTREE delivered the opinion of the court.

Appellee filed a claim in the County Court of Knox County against the estate of her father, James H. Dew, deceased, for the care and support of said Dew and his wife for five years prior to his death.

Appellant being administrator of such estate defended against the claim. On a trial in the County Court, without a jury, appellee was allowed the sum \$1,047, and the administrator appealed to the Circuit Court. Upon a trial in the last named court by a jury, appellee obtained a verdict and

judgment in her favor for \$1,000, the court having overruled a motion for new trial, appellant, as such administrator, prosecutes this appeal.

The evidence is quite clear and satisfactory that appellee took care of her father and mother for the five years covered by her claim, and that her services were worth all the jury have allowed her therefor, but the defense is, that appellee contracted and agreed with her father, when he was in Kansas in the presence of some of the heirs, that if appellee and her family were permitted to move upon and occupy a certain farm then owned by her father in Knox county, Illinois, she would support and take care of her father and mother for the use of the farm. And it is contended by appellant that in pursuance of such agreement, appellee brought her father and mother from Kansas, removed with them to her father's farm, and continued to reside there to the time of his death, and in her claim as filed, she gives credit on her account for five years' use of the farm, at the rate of \$300 per year, or \$1,500 for the term of five years.

Appellee denies that she ever made such agreement, and on this point there is a conflict in the evidence. It may be admitted that the proofs upon this question are not entirely satisfactory, but the evidence was for the consideration of the jury under proper instructions. It appears from the evidence that, for some twenty years prior to his death, the deceased was an epileptic and subject to frequent attacks of that disease, and it is contended by appellee that his mind was thereby so weakened as to render him incapable of entering into a binding contract. At the instance of appellee, the court gave instructions to the jury based upon the theory that if the father, by reason of disease or imbecility, was incompetent to enter into a legal contract with appellee, then she would not be bound, even if she had made the contract contended for by appellant. We do not thus understand the law, and hold such instructions to be erroneous. It is true, as a general proposition, that in order to make a valid contract, there must be competent parties capable of contracting, and whose minds must meet upon the

terms of the agreement. But as to the contracts of infants and lunatics, or persons *non compos mentis*, it is the well settled law of this State at least, that they are voidable only and not absolutely void. *Burnham et al. v. Kidwell*, 113 Ill. 425. They are capable of ratification by the incompetent person when the disability is removed. We think the question of competency may be raised only by the party himself, or his legal representatives, and can not be availed of by the same party to the contract to relieve himself from its performance. *Howe v. Howe and others*, 99 Mass. 88, 89; *Allis v. Billings*, 6 Metc. 415, 39 Am. Dec. 744, and note.

Any other rule than this would leave the *non compos* person a prey to the schemes of designing sharpers who might be unscrupulous enough to take advantage of his unfortunate position. Thus, if the same person to the contract could reap an advantage therefrom, he would do so, but if not, then he would disaffirm it on the ground the other party was incompetent.. The law is not so unmindful of the rights and interests of those who are incapable of protecting themselves.

Instructions were asked by appellant based upon the opposite theory and were refused by the court. We think this was error and that the instructions ought to have been given.

But for the error in the instructions we would not be disposed to reverse the judgment, but this is too serious to be overlooked, and the judgment must therefore be reversed and the cause remanded for a new trial.

John Flynn et al. v. L. M. Todd et al.

1. FRAUD—*Not to be Presumed*.—Fraud is never to be presumed; it must be proved, and a decree upon a creditor's bill which can not be sustained without presuming fraud, will be reversed.

Creditor's Bill.—Trial in the Circuit Court of Kane County; the Hon. HENRY B. WILLIS, Judge, presiding. Hearing and decree for com-

Flynn v. Todd.

plainants. Appeal by defendants. Heard in this court at the May term, 1898. Affirmed in part and reversed in part. Opinion filed September 26, 1898.

A. C. LITTLE and J. J. O'CONNOR, attorneys for plaintiffs in error.

ALDRICH, WINSLOW & WORCESTER, attorneys for defendants in error.

MR. JUSTICE WRIGHT delivered the opinion of the court.

In the first instance defendant in error filed a creditor's bill against the plaintiff in error to set aside three conveyances of real estate made by John Flynn to his daughter, Mary Jane Flynn, which had been made subject to certain incumbrances at the time existing upon the property conveyed. Answers were filed to this bill, and cross-bills were also filed by certain of the defendants to the original bill, one by Case & Uehren, a creditor's bill, and another by Catherine Duggan, to foreclose a mortgage upon the premises. It was alleged in the original bill, and the cross-bill of Case & Uehren, that the conveyances by the father to the daughter were without consideration, and intended to defraud, hinder and delay the creditors of John Flynn. Answers were filed to the cross-bills, and the cause, being at issue, was referred to the master to take the evidence and report the same, with directions to state his conclusions of law and fact. The master reported, finding that the conveyances were fraudulent, and in favor of a decree of foreclosure upon the Duggan cross-bill. Exceptions to the master's report were overruled by the court, and a decree given confirming it, and setting aside the conveyances, and for foreclosure, subjecting the property to executions in favor of the judgment creditors of John Flynn. To reverse this decree the present writ of error is prosecuted, and it is insisted the decree is against the evidence. In support of a *bona fide* consideration for the deeds in controversy both the Flynn's testified the daughter had, at different times, loaned the father in the aggregate \$3,000 and upward;

that she earned the money by years of work and industry on her part, she being twenty-seven years of age at the time of the trial; that she began working out at the age of fifteen years, and kept and saved her own earnings by her father's permission; that she worked in the first place for John H. Cox, in Aurora, of whom she received in all \$612; that she earned, received and saved wages from different persons and in different places and in divers capacities; at the cotton mills in Aurora, five years and three months, \$1,552.72; sewing, \$473.75. She learned short-hand and type-writing, and in that capacity accepted a position with W. J. Ruhle, in Chicago, and earned \$1,140, and that she earned and received various other sums. Both father and daughter testified they had kept a book account of the sums lent the father from time to time, which was introduced in evidence. It was also claimed and testified by the Flynn that the father had received \$7,000 from an uncle of the daughter intended as a gift to the latter, which the father had used and promised to repay. Aside from the testimony of father and daughter there was no evidence concerning the consideration of these conveyances. The property conveyed did not far exceed the incumbrances in value. Complainants introduced evidence tending to negative and discredit some of the sources from which the daughter claimed to have earned and received the money she swears she loaned her father. It is admitted by counsel for the defendants in error that it is not disputed that the young woman earned \$1,552 by work in the cotton mills at Aurora, as she had testified. Conceding this important item to be correct, it is not difficult to believe that she was capable of earning other sums, and it is reasonable to conclude that she did so, as stated by her. In some respects the Flynn were corroborated by other witnesses about the earnings of the girl. While the evidence is not entirely satisfactory in every particular, to uphold the conveyances, still the evidence of fraud is doubtful and unsatisfactory, and many steps of inference must be taken to supply it, with little or no justification for so doing, in view of the

John V. Farwell & Co. v. Norton.

whole evidence. Fraud is not to be presumed but must be proved. We are not satisfied with the conclusion that the decree is supported by the evidence and upon full consideration thereof believe it is not. It can not be sustained without presuming fraud. This view of the case supersedes the necessity of discussing the other questions raised by counsel for plaintiff in error. The decree will be affirmed as to the foreclosure, and in all other respects reversed, and the cause remanded at costs of defendants in error, except Duggan and Michels.

Affirmed in part, reversed in part and remanded.

John V. Farwell & Co. v. Eugene Norton et al.

1. FRAUD—*What Can Not be Considered as.*—Fraud can not be attributed to a person who, in failing circumstances, with property liable to be sacrificed at execution sales, sells it for a fair consideration and applies the proceeds to the payment of *bona fide* creditors.

Creditor's Bill.—Trial in the Circuit Court of Kane County; the Hon. GEORGE W. BROWN, Judge, presiding. Hearing and bill dismissed for want of equity. Error by complainant. Heard in this court at the May term, 1898. Affirmed. Opinion filed September 26, 1898.

OSCAR JONES and ERNEST C. LUTHER, attorneys for plaintiff in error.

D. B. SHERWOOD and JOHN A. RUSSELL, attorneys for defendants in error.

MR. JUSTICE WRIGHT delivered the opinion of the court.

Plaintiff in error, as the judgment creditor of Norton, Batt & Co., filed a creditor's bill against the defendants in error, charging a sale and conveyance of property from the debtors to Bertha W. Batt and William W. Norton was fraudulent, and intended to hinder and delay creditors; praying for discovery and that the conveyances might be

set aside. Sworn answers were filed, responsive to the bill, denying its material allegations, the oath not having been waived, to which replications were filed; and upon the hearing the court found against appellant and dismissed the bill for want of equity, and to reverse such decree this writ of error is prosecuted. It is insisted by appellant the decree is contrary to the evidence in the case.

We have examined the bill, answers and the evidence in the case. The burden of proof was upon the complaint to establish the allegations of its bill by a preponderance of the evidence, and to overcome the sworn answers of the defendants. We think the answers and the evidence together fall short of proving the fraud alleged. It is doubtless true the transaction by which the property in question was sold and transferred, was not free from suspicion of fraud and an intention to hinder and delay creditors in some respects; but Norton, Batt & Co. were in failing circumstances and their property liable to be sacrificed at execution sales, and under these conditions they sold it for a fair consideration—for more than a sheriff's sale would be likely to produce. The proceeds of the sale were used in payment of certain *bona fide* creditors. It can not be successfully disputed the property was so used, and while such creditors were preferred as against plaintiff in error and others, the property was applied as the law permitted. There is some conflict, as is usual, as to the actual value of the property disposed of; but on a fair consideration of the evidence, we do not think the value was so great as claimed by plaintiff in error, and are not inclined to believe the price paid for it was so far inadequate as to amount to a fraud *per se*. In truth it seems that the price paid was probably as much as could ordinarily be obtained in the condition of the property at the time.

It is also insisted that by means of the bill the appellees were forced to disclose by their answer certain real estate was liable to be seized upon to satisfy in part, the judgment of appellant, and therefore the court erred in dismissing the bill, and in not ordering the sale of such real

estate. There is no force in this position. It does not appear such property was not open to the discovery of any person by the exercise of ordinary diligence, without the aid of a court of equity; and as to such property, appellant's remedy was full and adequate by means of an execution upon its judgment, both before its bill was filed, and since it was dismissed by the decree of the court.

Finding no error, the decree of the Circuit Court will be affirmed.

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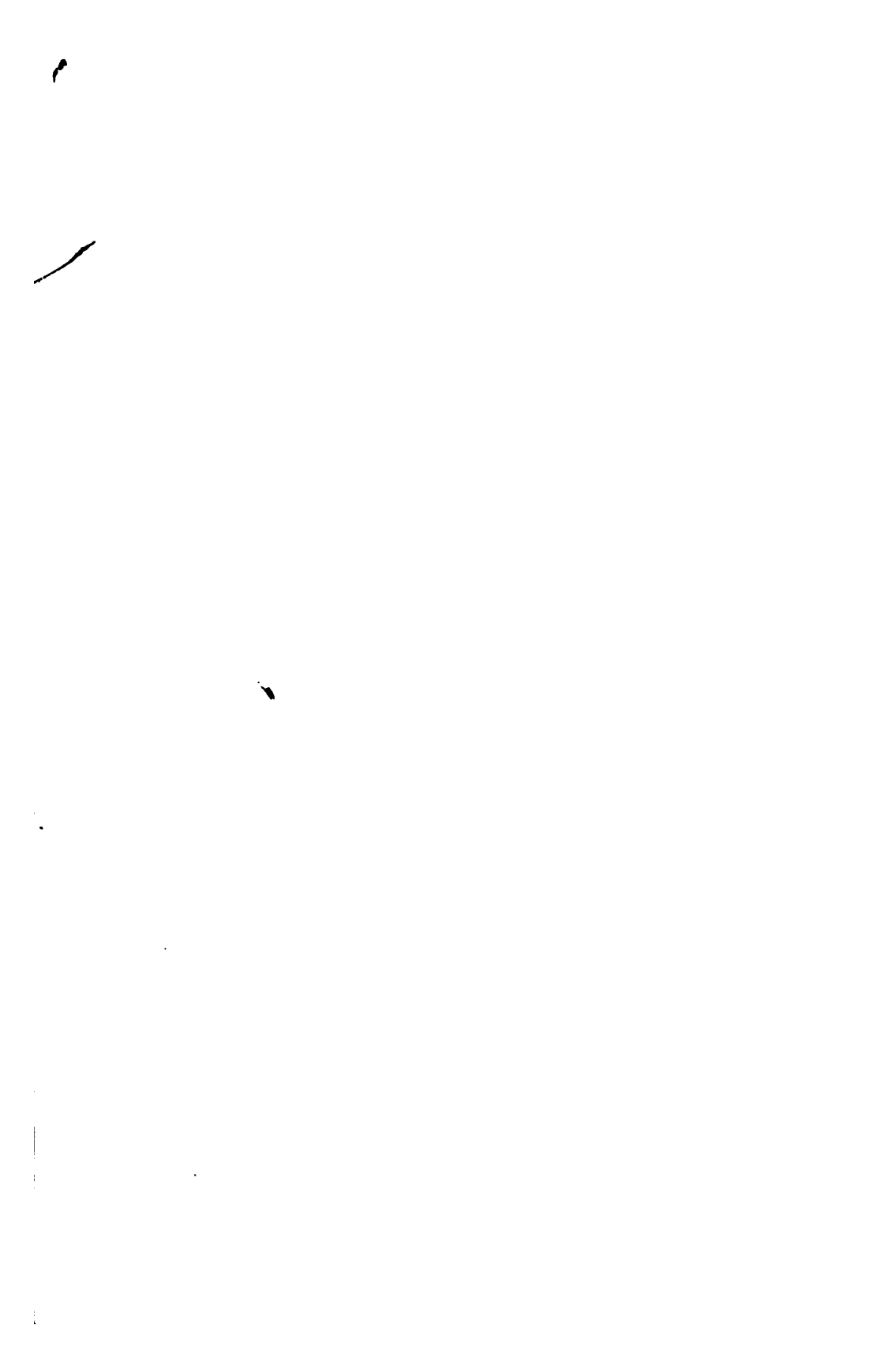
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